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# Corporate liability for climate change

## Is *Milieudefensie* a sign of what is to come?

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# Summary

Where states have failed to take the threat of global warming seriously, private individuals and environmental organizations have confronted those contributing to it. By bringing the emitters to court, litigants all over the world hope to put an end to the current trajectory towards dangerous climate change. Within the field of climate litigation, both governments and corporations are targeted. The success for claims brought against corporations has however for a long time been absent, and not until 2021 did claimants succeed in holding a corporation liable for its emissions. The *Milieudefensie et al. v. Royal Dutch Shell* ruling has, by environmentalists and legal scholars, been regarded as the most important ruling in the history of private climate litigation.

However, the legacy of the novel Dutch case is yet to be established. This raises questions surrounding the future of climate litigation beyond the ruling. Is it perhaps an indication of what is to come, or is it an anomaly in the field of private climate litigation? In order to assess the value of the case, this thesis sets out to establish the foundations for the ruling. The thesis identifies the issues regarding legal standing, legal basis, and causality, as being obstacles that domestic law has historically created for private climate litigation, but which by now have been surmounted by claimants, and due to legal and scientific development. It also examines the possibilities for private climate litigation arising from international law, mainly the Paris Agreement and human rights-treaties. After establishing these foundations, the thesis explores the *Milieudefensie* ruling, highlighting the impact domestic and international law had on the court's decisions.

The thesis finds that the *Milieudefensie* ruling is the natural culmination of the entire progress of domestic and international law within the field of private climate litigation up to this point. Traditional objections by the defendants based on domestic law, such as legal standing and attribution, are dismissed by the Dutch court. The Paris Agreement and human rights-treaties are directly applied onto a 'duty of care' stemming from Dutch tort law, with the result of Royal Dutch Shell being forced to reduce its emissions as to not violate the interests of Dutch residents. The ruling exhibits the interaction between domestic and international law, and also the role earlier case law has had for the court reaching its decision. As such, *Milieudefensie* is not an anomaly but the logical next step for private climate litigation. However, the future legal impact of the ruling will likely be limited as the Dutch 'duty of care' is relatively unique to the Netherlands, and the case would therefore be hard to replicate in another jurisdiction. Private climate litigants will nevertheless draw inspiration from the ruling, and courts in other countries will likely be motivated by the Dutch court's willingness to widely interpret domestic law to help combat climate change.

# Sammanfattning

Eftersom stater i hög grad har misslyckats med att ta den globala uppvärmningen seriöst, har istället privata individer och miljöorganisationer konfronterat dem som bidrar till den. Genom att föra de som släpper ut växthusgaser inför rätta hoppas kärandena kunna stoppa den nuvarande kursen mot förödande klimatförändring. Klimattvister kan rikta sig mot både regeringar och företag, men i just tvister mot företag har framgång under lång tid uteblivit. Det var först i 2021 som en grupp käranden lyckades hålla ett företag rättsligt ansvarigt för sina utsläpp. Domen i *Milieudefensie et al. v. Royal Dutch Shell* är enligt miljöaktivister och rättsvetare en av de mest betydelsefulla domarna för klimattvister mot privata aktörer.

Däremot är det fortfarande oklart vad för arv det relativt nya nederländska fallet kommer att få, och i samband med det uppstår frågor angående framtiden för klimattvister efter domen. Är domen möjligtvis en indikation på vad som kan väntas på området, eller är det bara en avvikelse bland många andra klimattvister? För att förstå det eventuella värdet av domen behövs även en förståelse för vad som föranledde den. Avhandlingen börjar med att undersöka frågor angående rättslig ställning, rättsgrund och kausalitet som härstammar från nationell rätt. Dessa har länge utgjort hinder för käranden i klimattvister, men har sedan dess överkommits genom rättslig och vetenskaplig utveckling. Avhandlingen undersöker även de möjligheter som internationell rätt har skapat för käranden i sådana mål, med speciellt fokus på Parisavtalet och mänskliga rättighetsinstrument. Därefter studeras domen i *Milieudefensie* och förtydligar det inflytande som nationell och internationell rätt har haft på domstolens beslut.

Avhandlingen fastslår att *Milieudefensie* domen är det naturliga resultatet av den påverkan som nationell och internationell rätt haft på klimattvister mot privata aktörer. Invändningar från svaranden som tidigare har varit slagkraftiga, t.ex. ang. rättslig ställning och kausalitet, avvisas av den nederländska domstolen. Vidare appliceras innehållet i Parisavtalet och ett antal mänskliga rättighetsinstrument direkt på den omsorgsplikt som följer av nederländsk skadeståndsrätt, vilket leder till att Royal Dutch Shell blir tvunget att reducera sitt utsläpp för att inte kränka de nederländska invånarnas rättigheter. Domen visar även på samspelet mellan nationell och internationell rätt, och hur tidigare praxis inom området påverkade domstolens avvägningar. *Milieudefensie* kan därför inte anses vara en avvikelse, utan var ett naturligt steg i utvecklingen för privata klimattvister. Däremot kommer troligtvis den framtida rättsliga effekten av domen att vara begränsad, då den nederländska omsorgsplikten är relativt unik för Nederländerna, och domen bör således vara svår att efterlikna i andra rättssystem. Oavsett så kommer framtida käranden inspireras av framgången i målet, och domstolar i andra länder kommer troligtvis att se till den nederländska domstolens villighet att brett tolka nationell rätt för att motverka fortsatt global uppvärmning.

# Preface

Jag vill börja med att rikta ett stort tack till min handledare Britta Sjöstedt som verkligen har hjälpt mig genom sina utmärkta kommentarer och intressanta diskussioner.

Tack till mina vänner som alltid funnits där för mig trots att jag försvunnit djupt in i mitt examensarbete.

Tack till min morfar och min farfar som har hejat på mig under hela min utbildning.

Tack mamma och pappa för allt stöd som ni har gett mig, vare sig det är avlastning, barnpassning, korrekturläsning eller bara allmänt motivationssnack.

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Slutligen vill jag tacka dig Carro. Jag kan inte beskriva hur viktig du har varit för mig under den här tiden och jag hade aldrig någonsin klarat det här utan dig.

Malmö den 24 maj 2021

Johan Åhman

# Abbreviations

| | |
|---|---|
| COP | Conference of Parties (of the Paris Agreement (in this thesis)) |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EIA | Environmental Impact Assessment |
| EPA | Environmental Protection Agency |
| EU | European Union |
| GHG | Greenhouse gases |
| ICCPR | International Covenant on Civil and Political Rights |
| IPCC | Intergovernmental Panel on Climate Change |
| NDC | Nationally Determined Contributions |
| NGO | Non-governmental Organization |
| RDS | Royal Dutch Shell |
| UN | United Nations |
| UNEP | United Nations Environment Programme |
| UNFCCC | United Nations Framework Convention on Climate Change |
| UNGA | United Nations General Assembly |
| UNGP | United Nations Guiding Principles on Business and Human Rights |

# 1 Introduction

## 1.1 Background

> "The science is clear. Climate change is happening. The impact is real. The time to act is now."
>
> – Ban Ki-moon, 2007[1]

The reality of anthropologically caused global warming has been clear for a long time by now, yet the urgency former UN General Secretary Ban Ki-moon tried to convey in 2007 pales in comparison to the immediate need for action today, 15 years later. While the nations of the world managed to unite in 2015 on the importance and emergency of halting global warming through the Paris Agreement,[2] irreversible and disastrous climate change by 2100 is looking more likely than ever. The current trajectory puts the estimated global warming by 2100 compared to pre-industrial levels between a 2.7°C and 3.1°C increase, compared to the necessary limit of 1.5°C, as a result of emission of carbon dioxide and other greenhouse gases (GHGs)[3] into the atmosphere.[4] All over the globe, people are taking action to put a stop to global warming. Through protests, education, political action, sometimes eco-terrorism, and other forms of environmental activism, environmentalists are pulling out all the stops hoping to put an end to the current downward spiral into irreversible climate change.[5] Others employ law as their weapon, bringing the fight against polluters to the courts. This practice is called climate change litigation, or 'climate litigation' for short. Climate litigation has seen a significant growth over the last couple of years and is all-the-while becoming a more viable tool for combating climate change. While the practice has seen its most use in the public sector, challenging actions taken or omitted by governments,[6] climate litigation against private corporations has at last started to gain traction. Here, the recent ruling in the Dutch case *Milieudefensie et al. v Royal Dutch Shell* (RDS)[7] may very well prove to be the case on which future private climate litigation is built upon.

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[1] UN, 'Leading on climate change' (*UN Treaty Collection*) <https://www.un.org/sustainabledevelopment/ban-ki-moon-climate-change> accessed May 4, 2022

[2] The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc. FCCC/CP/2015/L.9/Rev/1 (Paris Agreement).

[3] CO2 (carbon dioxide) is one of several GHGs. Throughout the thesis 'GHGs' will be used, apart from in the review of the *Milieudefensie* ruling, as the court in that case selected to use CO2.

[4] Brad Plumer and Nadja Popovich, 'Yes, There Has Been Progress on Climate. No, It's Not Nearly Enough' *New York Times* (25 October 2021) <https://www.nytimes.com/interactive/2021/10/25/climate/world-climate-pledges-cop26.html> accessed 29 April 2022.

[5] Lorraine Elliot, 'History of the environmental movement' (*Britannica*) <https://www.britannica.com/topic/environmentalism/History-of-the-environmental-movement> accessed 15 May 2022.

[6] Joana Setzer and Catherine Higham, *Global trends in climate change litigation: 2021 snapshot* (Grantham Research Institute on Climate Change and the Environment, LSE, 2021) p. 12.

[7] *Milieudefensie et al v Royal Dutch Shell* [2021] ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag (*Milieudefensie)*. The ruling will be examined in section 4.3.

The verdict in *Milieudefensie* in May of 2021 marks the first time in history where a corporation has with been held liable for contributing to global warming.[8] This has been welcomed dearly by environmentalists as private liability for global warming has long been sought. Multinational corporations play a significant role in climate change, and Carbon Majors[9] such as ExxonMobil, RDS, BP, Chevron and Peabody Energy each accounted for 1-2% of global industrial GHG emissions between 1988-2015.[10] In the same period, 41% of the GHG emissions caused by the 224 largest fossil fuel companies can be attributed to those privately owned.[11] Clearly, private corporations are to a significant extent responsible for global warming, yet they have escaped liability for it under an unreasonable amount of time. Governments have proven to be generally unwilling or unable to hold private corporations residing within their jurisdiction liable for global warming,[12] which has resulted in rulings such as the one in *Milieudefensie* becoming essential as a tool for the public to enforce laws, environmental values, and human rights in cases where governments choose not to. Following the ruling, environmentalists are hopeful that the case has paved the way for other private climate litigation cases to achieve the same success. However, due to the novelty of the ruling, the actual effects of it remain to be seen. The *Milieudefensie* ruling could prove the turning point in a long streak of failed claims, and finally establish the practice of private climate litigation as a viable tool for combating climate change.

## 1.2 Purpose and research questions

The ongoing and emerging trends in climate litigation create opportunities for interesting speculation as to what its future holds. For litigation against private corporations, the fact that the practice only recently has started to produce environmentally favourable results might indicate that something drastic needs to happen for private climate litigation to be a viable alternative for combating climate change. While the *Milieudefensie* ruling could hint that more wins are coming, it is still the only successful case amongst many failed, and most corporations still escape liability for GHG emissions. The thesis therefore seeks to identify whether the *Milieudefensie* ruling is an indication of what is to be expected in future cases, or if it is an anomaly in the field of private climate litigation. This also creates an

[8] Benoit Mayer, 'Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?' (*EJIL:Talk!*, 3 June 2021) <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change> accessed 3 May 2022.
[9] See Paul Griffin, *CDP Carbon Majors Report 2017* (CDP, 2017) (*Carbon Majors Report*).
[10] *Ibid*, appendix 1.
[11] *Ibid,* p. 10.
[12] See Andreas Hoesli, 'Corporate Climate Responsibility: From Reputational to Liability Risk' (*Blogging for Sustainability,* 17 December 2020) <https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/corporate-climate-responsibility--hoesli.html> accessed 5 April 2022. It should however be noted that while there are close to no laws directly limiting emissions by corporations, governments still create indirect emission boundaries through other means, such as permits, emission trading systems and carbon taxation.

opportunity for assessing the current viability of private climate litigation as a tool for creating corporate liability for climate change. In order to achieve this purpose, the build-up to the verdict must be examined. Private climate litigation consists mainly of two components: Domestic and international law. These have created both obstacles and opportunities for claimants throughout the practice's history,[13] and the evolution of these bodies of law eventually resulted in the *Milieudefensie* ruling. Therefore, these two components will constitute the core of the thesis, which reflects in the research questions:

- *What obstacles does domestic law create for private climate litigation?*

- *How does international law influence private climate litigation?*

These two questions aim to demonstrate the legal duality of climate litigation, and its dependency on both domestic and international law. Climate litigation has historically been governed by the domestic laws of the relevant state, both in procedural and material matters. However, following 2015, international law has begun to influence court rulings in both public and private climate litigation cases.[14] While is it relatively easy to imagine the impact of international law has on public climate litigation, as it creates direct obligations for states which claimants can rely on against said states, the interaction between domestic and international law in private climate litigation is, as will be seen, more complex.[15] Climate litigation relies on both levels of law, and to understand the strengths and shortcomings of the current regime, one must observe both national and international law.

The first question concerns domestic law and will be discussed in the context of historic obstacles for the practice, the progress climate litigation has made in overcoming them and what obstacles remain. Due to the novelty of successful private climate litigation, there are too few cases to rely solely on private climate litigation cases in the pursuit of answering this question. However, most issues that have plagued public climate litigation have also affected its private counterpart, and the ground that public litigation has gained reflects in recent private climate litigation rulings such as *Milieudefensie* and *Smith v. Fonterra Co-Operative Group Limited.*[16] It is therefore both possible and necessary to draw on public climate litigation jurisprudence for answering this question.

[13] The thesis will focus on the obstacles domestic law creates for claimants, and steer away from any discussion on the opportunities created by domestic law through more lenient procedural laws and more reliable environmental laws etc. This is motivated by the fact that the main obstacles, i.e. legal standing, legal basis, and causality are common throughout the world, whereas the opportunities of domestic law are naturally dependant on the development of environmental law in a given country, making it troublesome to make any general statements on these opportunities, see chapter 3.
[14] Maryam Golnaraghi et al., *Climate Change Litigation – Insights into the evolving global landscape* (The Geneva Association, 2021) p. 14-15.
[15] See chapter 4 below.
[16] *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419 (*Smith v. Fonterra*) para. 62.

The second question regards international law. There are mainly two types of international instruments that affect private climate litigation: Climate change treaties, such as the UNFCCC[17] and the Paris Agreement,[18] and human rights-treaties, such as the European Convention on Human Rights (ECHR)[19] and the UN Guiding Principles on Business and Human Rights (UNGP).[20] The recent influx of human rights-based argumentation in public and private climate litigation claims has set the tone for the field, which can be seen in private cases such as *Milieudefensie* and the ongoing *Notre Affaire à Tous and Others v. Total*,[21] and in public cases such as *Urgenda Foundation v. State of the Netherlands,*[22] and *Leghari v. Federation of Pakistan.*[23] Moreover, the incorporation of environmental values, including the protection against the effects of climate change, into fundamental rights-instruments has heavily influenced judicial interpretation and decision-making in questions concerning liability for climate change.[24] This becomes especially clear in the *Milieudefensie* decision, as will be seen in sections 5.1.2 and 5.1.3. Although the ruling has received its fair amount of criticism,[25] it nevertheless proves the potential of using international law for creating obligations on entities not directly affected by such treaties.

The findings under these two questions will give an indication as to whether the *Milieudefensie* ruling was a natural next step for private climate litigation and what is to be expected from here. It allows for a commentary on whether private climate litigation is currently a viable method for creating corporate liability for global warming, and where potential improvements could be made.

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[17] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force on 21 March 1994) 1771 U.N.T.S. 107 (UNFCCC).

[18] The thesis will focus mainly on the Paris Agreement as it built upon the UNFCCC, and therefore more representative for the current political perception of climate change. It is also sets targets for global warming and GHG emission reductions, both of which are utilized by the court in *Milieudefensie*. See sections 4.1 and 5.1 below.

[19] Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
ETS 5 (European Convention on Human Rights) (ECHR).

[20] UN Human Rights Office, 'Guiding Principles on Business and Human Rights' (2011) (UNGP).

[21] *Notre Affaire à Tous and Others v. Total* [2019] RG 20/00915, Tribunal Judiciaire de Nanterre (*Notre Affaire à Tous v. Total*).

[22] *Urgenda Foundation v. State of the Netherlands* [2019] ECLI:NL:HR:2019:2007, Hoge Raad (*Urgenda III*). For the purpose of clarity, the district court's, the court of appeal's, and the Supreme Court's rulings are labelled *Urgenda I, Urgenda II, and Urgenda III*, respectively. Where statements are made about the *Urgenda* cases generally, '*Urgenda*' will be used.

[23] *Leghari v. Federation of Pakistan* [2018] W.P. No. 25501/2015, Lahore High Court (*Leghari*).

[24] See section 3.2.2 and chapter 4 below.

[25] See for example Mayer (n 8); Tom Barkhuysen, 'Climate case Milieudefensie et al. – The Hague District Court orders Shell to reduce CO2 emissions' (*Stibbe,* 7 June 2021) <https://www.stibbe.com/en/news/2021/june/climate-case-milieudefensie-et-al--the-hague-district-court-orders-shell-to-reduce-co2-emissions> accessed 8 April 2022; Otto Spijkers, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell' (2021) 5:2 Chinese Journal of Environmental Law 237.

## 1.3 Delimitations

The thesis will as mentioned be placing focus on specifically 'private' climate litigation as opposed to public climate litigation or the area of climate litigation as whole. While public climate litigation is just as important as private climate litigation, or arguably even more so, in combating climate change, private climate litigation is the significantly less established and legally discussed variation of climate litigation, making it a more suitable subject to contribute to. The novelty of the *Milieudefensie* ruling and the impact it might have for all future private climate litigation cements this delimitation. However, public climate litigation does however play a key role for the thesis, as actually successful private climate litigation cases are so few and far apart, that it becomes necessary to draw analogical conclusions from public climate litigation cases. Most obstacles faced by climate litigation are shared by the two variations, with the main difference being the sources of obligations for governments and private corporations, respectively.

Climate litigation encapsulates the many areas of climate change and is not exclusive to actions aiming to reduce GHG emissions directly. Other areas include actions concerning environmental impact assessments (EIAs), permits, protecting biodiversity, greenwashing, emissions trading, etc.[26] However, as this thesis is heavily dependent on the *Milieudefensie* ruling and its importance to this area of law, I find it suitable to centre the thesis around the same topic as that case - GHG emission reduction and potential issues regarding mitigation and loss and damages that stems from it.[27] Furthermore, other areas of private climate litigation, for example EIAs and emissions trading, are generally subject to more established legal regimes.[28] Reduction of GHG emissions stand out in that regard, as there is an apparent lack of obligations and liability for private entities, making it a more interesting subject to examine. This does not mean that the thesis will completely disregard other areas of climate litigation, similarly as to how it is dependent on public climate litigation case law despite discussing private climate litigation. As can be seen in chapter 3, many of the issues surrounding climate litigation are common to most type of cases, and due to the volume of private climate litigation cases concerning GHG emission reduction being fairly limited, I find it appropriate in some cases to apply jurisprudence within other areas of climate litigation on the main topic of the thesis.

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[26] See Sabine Center for Climate Change Law, 'About' (*Climate Change Litigation Database*) <http://climatecasechart.com/climate-change-litigation/about> accessed 8 May 2022.

[27] This means that statements regarding the absence of successful private climate litigation cases only extends to cases within the scope of the thesis.

[28] See for example the European Council Directive on the assessment of the effects of certain public and private projects on the environment [1985] 85/337/EEC; and European Commission, 'EU Emissions Trading System' (*European Commission*) <https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets> accessed 20 April 2022.

Climate litigation has progressed at different speeds in different regions and there is therefore no established global approach to the practice, the types of arguments used by the claimants and how courts rule.[29] With European and Anglo-Saxon countries being at the forefront of the progress, the available legal material and case law mostly stems from these regions.[30] This regretfully causes the thesis to skew away from its actual intended purpose of portraying climate litigation as a global phenomenon. A comparative study where all regions of the world are compared against one another could perhaps achieve this, but the many distinct aspects of climate litigation would make such a task too lengthy for this thesis. It should however be said that current trends show countries in the Global South, i.e., Africa, Asia, and South America,[31] following the patterns set by European and Anglo-Saxon countries in matters of climate litigation.[32] The findings of this thesis could therefore prove relevant and applicable world-wide.

## 1.4 Method

The thesis is centred around discussing the general state of private climate litigation as before the *Milieudefensie* ruling. Identifying a suitable legal method for this has however proven difficult, as climate litigation both exists in a confined national legal order, yet evolves in conjunction with climate litigation in other countries. In other words, climate litigation in a given country is both bound by the procedural and material law of that state, yet it is also affected by the progress in science, jurisprudence from other countries, inventive legal reasoning by claimants globally, and emerging international law. As an example, the *Urgenda* rulings, which will be returned to in section 1.5, has had a massive impact on climate litigation in many parts of the world, regardless of the fact that Dutch rulings naturally do not create jurisprudence outside of the Netherlands. In a sense, there is both individual domestic climate litigation regimes that exists in law and a global regime on climate litigation existing in theory, which interact with each other. I would therefore argue that utilizing a strict comparative method, where climate litigation in different countries is compared to other countries, does not do justice in explaining the state of climate litigation and its progress. Neither is it possible to make statements regarding 'de lege lata', or what the law is,[33] on a global scale, as there is no actual international legal regime on the matter.

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[29] Grantham Research Institute at LSE, 'Visualise data on the map' (*Climate Change Laws of the World*) <https://climate-laws.org/#map-section> accessed 12 May 2022.
[30] See Golnaraghi et al. (n 14) p. 16-17.
[31] I am applying the definition used by Peel and Lin, see Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South (2019) 113 American Journal of International Law 679, p. 681-682.
[32] See for example *Ibid,* p. 683.
[33] Jan Kleineman and Mauro Zamboni, *Juridisk metodlära* (2nd edn, Studentlitteratur AB, 2018) p. 21, 36.

I have instead selected to divide the thesis into two parts to examine the general state of private climate litigation. The first part, and research question, aims to explore obstacles domestic law has created or creates for private climate litigation. This is done by utilizing a comparative method. The *tertium comparationis*, or the object of comparison,[34] is however not climate litigation as a whole in a given state. Instead, the *tertium comparationis* is the different obstacles stemming from domestic law that climate litigation claimants have struggled or struggles with, i.e. legal standing, applicable environmental obligations, and causality,[35] and the object of comparison will therefore change continuously throughout the first part.[36] The obstacles as such are for the most part prevalent in all legal orders, but as will be seen, the way courts have approached these varies widely between different countries. By comparing the different stances courts have held on these issues, it becomes possible to observe in which countries or regions these obstacles remain or have been overcome, or simply, if it is a joint obstacle. The comparisons will allow for conclusions on the overall effect these issues have on the evolution of the global private climate litigation regime and its viability.[37]

The second part, and research question, elevates the issue to the international level. As opposed to domestic laws, international law has a more widespread effect and impacts the practice of climate litigation in many countries all over the world. This makes continued comparisons redundant, and the thesis therefore departs from the comparative method. Instead, this section will be subject to a critical legal analysis of the influence international law exerts onto private climate litigation overall. This is done by highlighting the different relevant international instruments and discussing their impact on climate litigation overall. The thesis then examines the significance that both international and domestic law had for the *Milieudefensie* ruling, by both examining the case and the criticism following it. This allows for a discussion on the future outlook of private climate litigation, and whether the aforementioned verdict will play a role in it.

[34] See Ralf Michaels, 'The Functional Method of Comparative Law' (2006) The Oxford Handbook of Comparative Law 339, p. 367.
[35] See the different sections of chapter 3.
[36] Section 3.1 regarding legal standing, applies a strict comparative method and compares different regions against one another, due to legal standing being very prevalent as an obstacle for climate litigant. Section 3.2 and 3.3, consisting of many smaller issues regarding obligations and causality, does not allow for the same global scale of the comparison, due to there being less applicable cases. Instead, only the most recent cases throughout the world that are relevant for the given issue are examined and compared.
[37] See Ronald A. Brand, 'Comparative Method and International Litigation (2020) 2020 Journal of Dispute Resolution 273, p. 274.

## 1.5 Material

As has been discussed above,[38] while climate litigation is based in some form of national or regional laws in matters such as legal standing, legal basis and court jurisdiction, the current state of the practice is not portrayed properly in the written law. Climate litigation evolves somewhat independently of climate litigation regulation, with climate change science, inventive legal reasoning by the claimants and international treaties being the main driving forces behind its progress.[39] Written law does not reflect this correctly as it adapts and evolves too slowly. A better indicator of the current perception of climate litigation is instead the courts' interpretation of the law. In a sense, the truest reflection of the legal community's stance on climate change is the courts' willingness, or lack thereof, to expand upon existing environmental law, fundamental rights, or tort law to comprise obligations concerning climate change. Similarly, courts may give influence to international law in its private climate litigation decisions despite it creating no direct obligations for private entities. Courts have quickly become the most crucial tool for progressing climate litigation, and their ability to interpret domestic and international law in a way that reflects the general scientific and public consensus in matters of climate change, is essential for combating global warming. However, extensive judicial interpretation of existing law has generally been a controversial act as it borders on law-making, and has therefore been met with heavy critique from legislators and legal scholars alike.[40] The examination of jurisprudence, in the light of doctrine, is nevertheless the most optimal tool for creating a representative picture of private climate litigation, and to this end, the thesis relies heavily upon climate litigation case law and legal doctrine interpreting these rulings.

In order to identify and select suitable case law, I have utilized the Climate Change Litigation Database, operated by the Sabin Center for Climate Change Law at Columbia,[41] and Climate Change Litigation of the World, operated by the Grantham Research Institute at London School of Economics.[42] Both databases provide an invaluable collection of climate litigation cases as well as summaries and court document translations in English allowing for the thesis to include lesser-known cases in other languages than English.

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[38] See section 1.4.

[39] See Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the *Sharma*, *Nebauer*, and *Shell* cases' (2021) 22 German Law Journal 1484, p. 1484-1487. While strategic climate litigation plays, and has played, a vital role in progressing the field of climate litigation, it has less to do with law and more to do with creating public pressure through a careful selection of plaintiffs, defendants, and arguments. Therefore, strategic climate litigation falls outside the scope of this thesis.

[40] See section 5.1.4.

[41] Sabine Center for Climate Change Law, 'About' (n 26).

[42] Grantham Research Institute at LSE, 'About' (*Climate Change Laws of the World*) <https://climate-laws.org/about> accessed 12 May 2022.

Throughout the thesis, several cases will be mentioned repeatedly due to their significance to the topic and to climate litigation as a whole. *Milieudefensie* was selected because of it being the first case where a corporation was held liable for global warming, making it among the most important rulings of the 2020s.[43] *Milieudefensie* was in turn built upon *Urgenda*, a case with importance for the area of public climate litigation and the main reason for the current fundamental rights-based argumentation utilized by claimants.[44] In *Urgenda*, the Dutch government was ordered by the different Dutch courts to limit its GHG emissions, based on several instruments of law, including the Dutch Constitution, the ECHR, EU emission reduction targets and the Dutch 'duty of care'.[45] *Neubauer et al. v. Germany* is another successful public climate case built upon fundamental rights, yet is unique due to the three recently filed private climate litigation cases that base their argumentation on the court's findings in *Neubauer et al.*[46] Finally, the recently 'unsuccessful' Australian case *Minister for the Environment v. Sharma* is used to highlight both the issues tort law faces in the context of climate change and conservative lines of arguments as regards attribution science.[47]

There are several sources of legal doctrine in the area of climate litigation. In this thesis, the works of Jacqueline Peel, as well as Joana Setzer, will be consulted in general matters on climate litigation. Peel have written extensively on climate litigation as a whole and emerging patterns within the field.[48] Setzer, in collaboration with other scholars, has released yearly updates as to the current trends in climate litigation. These 'snapshots' both recap the passing year and also examine the impact and importance of certain cases and discuss the future prospects of climate litigation.[49] In 2020, the UNEP also published its own report on climate litigation, which has been a key source for presenting and discussing the historic and present obstacles for climate litigation.[50] Specifically concerning private climate litigation, the thesis consults a work by Ganguly, Setzer and Heyvaert that deals with the different waves of private climate litigation and what issues the practice has been forced to overcome during its progress.[51]

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[43] See Mayer (n 8) and section 5.2 below.
[44] See Peel and Markey-Towler (n 39) p. 1494.
[45] *Urgenda III* (n 22).
[46] See *Neubauer et al. v. Germany* [2021] BvR 2656/18, BVerfG (*Neubauer et al.*); and Victoria Waldersee, 'Greenpeace Germany sues Volkswagen over carbon emissions targets' *Reuters* (9 November 2021) <https://www.reuters.com/business/cop/greenpeace-germany-sues-volkswagen-over-carbon-emissions-targets-2021-11-09> accessed 2 May 2022.
[47] *Minister for the Environment v. Sharma*, [2022] FCAFC 35, Federal Court (*Sharma*).
[48] See for example Peel and Lin (n 31); Peel and Markey-Towler (n 39); and Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37.
[49] See Setzer and Higham (n 6).
[50] UNEP, *Global Climate Litigation Report: 2020 Status Review* (2020) (*GCLR 2020*).
[51] Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38:4 Oxford Journal of Legal Studies 841.

While the unspoken, yet somewhat apparent, goal of the thesis is to ensure corporate liability for climate change, it aims to present the reasoning for it in an objective manner. It would be hard to claim that the aforementioned legal doctrine is unbiased along the environmentalism and anti-environmentalism[52] divide, as the works represent apparent environmental values. However, finding legal doctrine that skews in the other direction has proven difficult. Instead, the best source of critique against the current state of climate litigation is found in relevant dismissive rulings. Through highlighting the arguments presented by the courts in decisions unfavourable to the environment, a balance between sources representing environmental and anti-environmental values respectively is reached.[53]

As concerns the origin of the cases and legal doctrine utilized by the thesis, due to climate litigation not progressing at an equal pace around the world, there is a disproportionate amount of climate litigation cases in Europe, the United States and Australia. This means that the suitable case law and legal doctrine will mostly be of the European and Anglo-Saxon kind.[54] Nevertheless, climate litigation is progressing in the same direction all around the world making the cases and doctrine presented relevant globally despite the narrow geographical scope.[55]

## 1.6 Disposition

Based on the research questions and the legal methods chosen, the thesis has been divided into three chapters past the introductory chapter, excluding the conclusion of the thesis. While the structure is centred around domestic and international law, the chronological periods of their respective emergence naturally coincide with the different waves of private climate litigation, as labelled by Ganguly et al.[56] The structure of the thesis thus follows the evolution of private climate litigation: Starting with the obstacles of its early days, examining the possibilities presented by international law, and ultimately culminating in the *Milieudefensie* ruling.

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[52] Anti-environmentalism can be described as the antithesis of environmentalism. Anti-environmentalists often argue that environmental protection inhibits the economy and job creation. Where the phrase 'anti-environmental values' is used, see note 53, it should be understood as values contrary to environmental values, such as combating climate change and achieving sustainable development. See 'Anti-Environmentalism' (*European Centre for Populism Studies*) <http://www.populismstudies.org/Vocabulary/anti-environmentalism>, accessed 15 May 2022.

[53] It should be understood that a dismissive ruling does not equal an anti-environmental court. In some cases, courts choose to not apply extensive interpretation of existing law to encompass environmental values where otherwise possible. In other cases, the courts' hands are tied due to issues regarding legal standing, legal basis, or jurisdiction etc. The fact that the courts are forced to rule in a way that is unfavourable to the environment is a result of the legislator's anti-environmental values. Judges arguing in a 'dismissive' manner is therefore a reflection of anti-environmental values regardless of whether it chooses to do so or not.

[54] See Jacqueline Peel and Hari M. Osofsky, 'Climate Change Litigation' (2020) 16:1 Annual Review of Law and Social Science 21. p. 22-23.

[55] See section 1.3 above.

[56] See section 2.

Chapter 2 serves as an introduction to the practice of private climate litigation and how it has evolved from being a matter of domestic law to drawing on influence from international law. This is done by examining the two waves of private climate litigation and highlighting both the issues it has faced during the various stages, and the factors which helped it progress forward.

Chapter 3 concerns climate litigation within the context of domestic legal orders. The chapter examines the progress climate litigation has made in overcoming the hurdles posed by domestic law and identifies the obstacles still remaining. Here, three of the key issues climate litigation faces are examined: Legal standing, legal basis, and causality/attribution. These are discussed and examined through the lens of landmark climate litigation cases.

Chapter 4 focuses on international law. Firstly, the Paris Agreement is introduced into the thesis, and examined as a tool for combating climate change. The thesis then explores the impact that the treaty has had on the field of climate litigation and how it may affect the legal liability for private entities. Secondly, the apparent turn in climate litigation towards rights-based argumentation is examined and the reasons behind it are explained. Here, a few different human rights-treaties are highlighted, and the thesis aims to explain their applicability on climate litigation and other environmental issues.

Chapter 5 leans into the *Milieudefensie* ruling and what awaits beyond it. While the main focus is placed on how international law influenced the decision, the review of *Milieudefensie* nevertheless serves as a culmination of the thesis' previous findings, putting most of the issues examined earlier into a present and relevant context. The section starts with providing a background to the case and examining issues of admissibility. Following this, the court's overall reasoning for its decision is explained, all-the-while assessing the importance of rights-based argumentation and the Paris Agreement in private climate litigation. The thesis then examines the aftermath of the ruling, discussing the criticism the ruling has faced, the ongoing appeal, and the future impact of it. The chapter concludes with a discussion on future of private climate litigation, discussing whether the arguments used in *Milieudefensie* could be used in other countries, and identifying patterns in climate litigation that provide insight into the future of the practice.

Finally, in chapter 6 the findings of the earlier chapters are summarized and discussed in relation to the research questions and the purpose of the thesis. The chapter ends with a brief discussion on the outlook of corporate liability for climate change heading forward, and how the global regime on private climate litigation could draw inspiration from other distinct legal regimes to ensure corporate liability.

# 2 The evolution of private climate litigation

The practice of climate litigation emerged alongside the early development of international environmental law during the end of the 20th century.[57] Climate litigation is by the UNEP defined as "cases […] relating to climate change mitigation, adaptation, or the science of climate change […] brought before a range of administrative, judicial, and other adjudicatory bodies."[58] The claims in climate litigation cases are usually brought by environmentalists with the aim of making the opposing party seize with its environmentally destructive behaviour, either by a court order or through the public pressure likely arising from the case.[59] Climate litigation cases can be either public, targeting governments and its bodies, or private, targeting corporations, and are generally brought by either individual citizens, non-governmental organizations (NGOs) or other public interest groups. As of May 2021, there are more than 1800 climate litigation cases across the globe, with approximately 1400 of them taking place in the US. There is also a clear trend of climate litigation becoming increasingly more frequent as more than half of all cases have been filed after 2015.[60]

While the first significant public climate litigation case occurred in 1990,[61] private climate litigation began emerging around 2005.[62] Naturally, the private climate litigation regime has therefore been less developed than its public counterpart for most of its relatively short existence. This difference becomes especially apparent when comparing the success rate between the two variations. In public climate litigation, plaintiffs have seen plenty success, with 58% of cases resulting in an environmentally favourable outcome.[63] Climate litigation against the private sector has, on the other hand, been an entirely different story. *Milieudefensie* is the first case in which a corporation was found liable for contributing to GHG emissions,[64] which evidently means that all previous private climate litigation rulings, at least in cases concerning GHG emission reductions, have been 'environmentally unfavourable'. However, private climate litigation cases ending without a favourable ruling can also produce positive effects on emission reductions. 'Strategic private climate litigation' can assert bottom-up pressure on corporations by putting their contributions to climate change in the public spotlight. By

[57] See Brian J. Preston, 'Climate Change Litigation (Part 1)' (2011) 5:1 Carbon & Climate Law Review 3, p. 4.
[58] UNEP, *GCLR 2020* (n 50) p. 6.
[59] Ganguly et al. (n 51) p. 865.
[60] Setzer and Higham (n 6) p. 5.
[61] Preston, 'Climate Change Litigation (Part 1)' (n 57) p. 4.
[62] Ganguly et al. (n 51) p. 846.
[63] Setzer and Higham (n 6) p. 5. This figure regards all types of climate litigation cases, and it is therefore not necessarily representative of the success rate of the cases within the scope of the thesis, i.e., those concerning GHG emission reduction, mitigation, and loss and damages.
[64] *Ibid,* p. 19-20.

attributing global warming to the most emitting entities, i.e., the Carbon Majors,[65] their responsibility for the potentially ensuing catastrophe becomes clear and could influence the companies' reputation. Moreover, the threat of being targeted by a private climate litigation claim could force or motivate corporations to move away from their emitting activities as to not suffer any reputational consequences, fines, or other legal redress.[66] This is especially the case now when success in these claims have been proven possible. Despite the lack of favourable rulings, private climate litigation can and has asserted influence on the private sector's contributions to global warming.

Nevertheless, private climate litigation would likely fade into insignificance if claimants remained unsuccessful with their actions. In May 2021, the progress of private climate litigation, being propelled by innovative argumentation, science, and a combination of domestic and international law, had finally reached a point where such success became possible – the *Milieudefensie* ruling. The road to achieving a favourable verdict has been long and difficult, starting with climate litigants being forced to overcome both obstacles based in procedural and material domestic law, as well as the issue of insufficient scientifical evidence. Later on, private climate litigants, having sought inspiration in successful public climate litigation cases, began crafting new legal approaches based in international law, which ultimately proved successful in *Milieudefensie*. This progress, as labelled by Ganguly et al., constitutes the two waves of private climate litigation, beginning with the obstacles of domestic law, and followed by the possibilities of international law.[67] After a brief introduction to the overall features of the different waves in the following sections, the thesis will over the next chapters examine them in depth.

## 2.1 The first wave

According to Ganguly et al., the first wave of private climate litigation stretched from 2005 to 2015. With private climate litigation still being in its infancy, there is little case law to actually study, most of which is attributed to the U.S.[68] Here, the two U.S. cases *Kivalina v. Exxon Mobil* and *Comer v. Murphy Oil* can be mentioned as the most representative examples of this stage of private climate litigation. In *Kivalina*, the claimants argued that ExxonMobil and other energy corporations, due to their GHG emissions, were responsible for adverse climate impacts, such as the melting of sea ice and coastal erosion.[69] As for *Comer*, the claimants held that a select group of energy corporations had increased the intensity of Hurricane Katrina

[65] See *Carbon Majors Report* (n 9).
[66] Ganguly et al. (n 51) p. 843-846.
[67] See *Ibid.*
[68] *Ibid* p. 846.
[69] *Native Village of Kivalina v. ExxonMobil Corp. et al.* [2012] 696 F.3d 849, 9th Cir. (*Kivalina*).

through their GHG emissions.[70] The main topics of discussion in these cases were legal standing and causation, two issues soon-to-be examined in depth by the thesis.[71] In short, legal standing regards who may bring a case in front of a court, and causation regards connecting the activities of an emitter to actual, or a risk of, damage to the claimants.

In both *Kivalina* and *Comer*, the courts drew inspiration from the public climate litigation case *Massachusetts v. Environmental Protection Agency* (EPA)*,*[72] a case which will be returned to under section 3.1.1. Here, the US Supreme Court had established a set criteria needed to be fulfilled by the claimants in order to be granted legal standing. The courts in *Kivalina* and *Comer* held that the claimants in both cases did in fact not fulfil these criteria, and were therefore not granted legal standing, partly because they could not claim that the defendants contribution to climate change caused or worsened their injuries.[73] As concerns causation specifically, these rulings are very indicative of this wave's lack of so-called 'attribution science', meaning science that allows for attributing damage caused by climate change, to the emitters.[74] It was at this point in time not possible to make any definitive connections between GHG emissions and extreme weather effects.[75]

As shall be seen in chapter 3, the issues of the first wave have been gradually overcome by climate litigation claimants. This progress has continued into the second wave, and has made it possible for litigants to actually present their claims in front of a court, rather than being dismissed instantly due to not meeting the procedural requirements.

## 2.2 The second wave

During the second wave of private climate litigation, starting in 2015, the practice had begun to gain traction in other countries, with especially Europe and Australia seeing increasingly more cases.[76] This wave was mostly initiated by the 2013 report on Carbon Majors and their significant contribution to climate change.[77] The adoption of the Paris Agreement in 2015 would also help motivate increased climate action in, and by, the private sector. Moreover, the success seen in public

[70] *Comer v Murphy Oil USA Inc* [2010] 607 F.3d 1049, 5th Cir. (*Comer*).
[71] See section 3.1 and 3.3 respectively.
[72] *Massachusetts v. Environmental Protection Agency* [2007] 549 U.S. 497, S. Ct. (*Massachusetts v. EPA*).
[73] See *Kivalina* (n 69) para. 104; and *Comer* (n 70) paras. 858-862.
[74] See section 3.3 below.
[75] Reinhard Mechler et al., *Loss and Damage from Climate Change* (Springer Cham, 2019) p. 127-132.
[76] Ganguly et al. (n 51) p. 849-850.
[77] See Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers' (2014) 122 Climatic Change 1854. See also section 1.1 and note 9 above regarding the findings of the updated 2017 report.

climate litigation cases, such as *Urgenda* and *Leghari,* would eventually begin to influence private climate litigation. Claimants sought inspiration from the argumentation used in these victorious claims, and found potential in using human rights-treaties to base their argumentation upon.[78] The second wave of private climate litigation can be said to be characterized by the influence of international law. This influence will be examined further in chapter 4.

Ganguly et al. highlights a few key staples of private climate litigation within this period.[79] Firstly, the fifth IPCC report,[80] the Paris Agreement and the *Carbon Majors Report* established a new scientific context for corporate behaviour in terms of GHG emissions. The IPCC report allowed claimants to refer to "robust scientific consensus on anthropogenic climate change", as stated by Ganguly et al., which inevitably has affected courts' stances on climate change.[81] This can also be seen in cases such as *Milieudefensie*[82] and *Smith v. Fonterra*.[83] Moreover, the *Carbon Majors Report* revealed just how much private entities have contributed to global warming.[84] According to Ganguly et al., this naturally rendered historical arguments by defendants, on "their contribution to GHG emissions [being] insignificant", useless.[85] In *Luciano Lliuya v. RWE AG,* one of the first private climate litigation cases of the second wave, a Peruvian farmer argued that a German energy company, due to its significant GHG emissions, was responsible for damage in Peru arising from climate change.[86] The farmer had relied on the *Carbon Majors Report* to identify the contribution that RWE had made to the increasing global warming.[87]

Secondly, as many countries and regions started introducing environmental rights into their domestic constitutions or international human rights-treaties,[88] private climate litigants naturally began relying on these rights as a legal basis for their arguments:[89] The *Milieudefensie* ruling was heavily based on the ECHR and ICCPR,[90] the claimants in the Japanese case *Sendai Citizens v. Sendai Power Station* attempted to rely on their constitutional rights to life and health before the

[78] Golnaraghi et al. (n 14) p. 14-15, 17.
[79] Ganguly et al. (n 51) p. 850.
[80] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Group I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014).
[81] Ganguly et al. (n 51) p. 851.
[82] *Milieudefensie* (n 7) paras. 4.4.30-4.4.34.
[83] *Smith v. Fonterra* (n 16) paras. 27-29.
[84] See section 1.1 and note 9.
[85] Ganguly et al. (n 51) p. 852-854.
[86] *Luciano Lliuya v. RWE AG* [2015] 2 O 285/15, District Court Essen (*Lliuya v. RWE*).
[87] Ganguly et al. (n 51) 853-854, 855.
[88] See section 4.2 below.
[89] Ganguly et al. (n 51) p. 863. See also Setzer and Higham (n 6) p. 29.
[90] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S 171 (ICCPR). See also section 5.1.2 below.

case ultimately being dismissed,[91] and in the ongoing *Notre Affaire à Tous v. Total* the claimants are arguing that based on the French 'duty of vigilance', the defendant is required to mitigate the risk of damaging their human rights.[92]

Lastly, the establishment of the Paris Agreement meant that states had to implement different domestic measures to ensure reduction of GHG emissions.[93] In most countries, these included climate change related disclosure requirements for corporations and climate change risk management, thus changing climate change from a strictly public issue to something that needed to be considered and incorporated into corporate policies and strategies.[94] Calls were also made for introducing a corporate 'duty of care' for the environment,[95] which was eventually achieved in *Milieudefensie*.[96]

Whether private climate litigation is still in its second wave, or if it has continued into its third, remains unquestioned in legal doctrine, but it is possible that the *Milieudefensie* ruling has pushed it into the third wave. This question will be returned to in chapter 5.

[91] See Grantham Research Institute at LSE, 'Sendai Citizens v. Sendai Power Station' (*Climate Change Laws of the World,* 2021) <https://climate-laws.org/geographies/japan/litigation_cases/sendai-citizens-v-sendai-power-station> accessed 4 May 2022.
[92] *Notre Affaire à Tous v. Total* (n 21) p. 21.
[93] See section 4.1.
[94] See Ganguly et al. (n 51) p. 858-861 and Setzer and Higham (n 6) p. 29.
[95] Ganguly et al. (n 51) p. 860.
[96] See section 4.3 below.

# 3 Domestic law and its obstacles

Despite the international use of climate litigation and the globality of the problems it tackles, the practice is nevertheless confined within each country's legal order. It is both created and bound by domestic law, with procedural law justifying its existence as a legitimate school of litigation, and material law providing the legal basis for litigants to rely upon. Climate litigation is, in essence, standard litigation in matters concerning climate change.[97] However, as will be seen below, the law surrounding regular litigation has proven unsuitable for dealing with the complexity of climate change. Due to the continuous failure, or unwillingness, of legislators and adjudicators to adapt and evolve its legal orders to accommodate climate litigation, the practice has faced significant hardship during its history. Many of the hurdles climate litigation was met with in its infancy remains to this day, although climate litigants have made clear progress in overcoming them by attempting new approaches and learning from their failures.[98] In this chapter, some of the challenges climate litigation faced or faces will be examined. The UNEP has identified several such obstacles, which will provide the basis for the following sections. These hurdles regard the issue of legal standing, the issue of identifying environmental obligations that the defendant has violated, and the issue regarding attributing damage to an emitting entity.[99]

## 3.1 Legal standing

The first issue regards whether the claimant possesses the capacity of bringing an action in front of a court. In legal theory, this involves identifying whether or not the claimant has legal standing, or *locus standi,* for the case at hand. If a claimant cannot show legal standing, courts must generally dismiss the case. Locus standi is based upon several criteria, which can vary widely between different countries. It can however be claimed that those directly and personally affected by an action generally possess legal standing throughout the world. In cases where a claimant cannot be said to be directly and personally affected, legal standing instead becomes a difficult obstacle to surmount. This is especially the case as concerns NGOs, due to these organizations not being able to claim that they are directly and personally affected as they are legal, and therefore not natural, persons. Environmental NGOs being granted legal standing is an essential part of climate litigation, as most individuals, whether they are negatively affected by an action or merely caring for the environment, often lack the financial, legal and scientific resources, and knowledge to bring successful claims against governments or companies with

[97] See Peel and Lin (n 31), p. 16-22.
[98] Compare Jaqueline Peel, 'Issues in Climate Change Litigaiton' (2011) 5:1 Carbon & Climate Law Review 15 to UNEP, *GCLR 2020* (n 50) p. 37-44.
[99] See UNEP, *GCLR 2020* (n 50) p. 37-44.

greater resources.[100] It is possible in some countries for an NGO, regardless of its own legal standing, to act as a legal representative *ad litem* for the claims of individuals,[101] act on behalf of its members,[102] or accompany a claim pursued by individual claimants.[103] While this would allow for an NGO to assist with its resources, the individual claimants must still be able to show legal standing of their own, which as will be seen below, remains difficult in many situations.

### 3.1.1 The United States of America

In the United States' legal system, standing requires, among other things, that a claimant is affected by a 'particularized' injury, meaning that it affects them 'in a personal or individual way', and that there is a 'concrete' injury.[104] This can be especially problematic in the area of climate litigation, as no one citizen has standing if the general public are all affected in a similar way,[105] which is frequently the case for climate change. This was also the argument brought by the defendants in the public *Massachusetts v. EPA* case. Here, a group of states in the north-eastern U.S. argued that the EPA had violated its duty to regulate GHGs under the Clean Air Act. The EPA countered with that since GHG emissions cause destruction on a more widespread scale, the claimants did not have standing based on the aforementioned standing test. The State of Massachusetts contended, and could show, that due to its geographical location along the Atlantic Ocean, it suffered a 'personalized' and immediate risk of flooding as a direct result of global warming.[106] The Supreme Court of the U.S. agreed with the claimants and reiterated from an earlier case that "it did not matter how many persons have been injured […] [if] the action injures [the claimant] in a concrete and personal way."[107] The court also found that the above, alongside Massachusetts procedural right as a state to challenge "agency action unlawfully withheld", resulted in Massachusetts having legal standing. Despite the fact that the claimants were deemed to have locus standi due to global warming, this was however not a significant departure from the original standing test, as the requirement of personalized injury remained.[108]

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[100] See Jaqueline Peel and Hari M. Osofsky, 'Barriers to Progress through Litigation' in *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) p. 279-282.
[101] See for example *Milieudefensie* (n 7) paras. 2.1.8, 4.6.3; The Polish Code of Civil Procedure (17 November 1964), art. 61 § 1(2); and *ENvironnement JEUnesse v. Canada* [2019] 500-06-000955-183 Superior Court of Quebec.
[102] See section 3.1.2 below.
[103] See for example *Neubauer et al.* (n 46).
[104] See *Spokeo, Inc. v. Robins* [2016] 578 U.S. 330, S. Ct., para. A.
[105] See *Schlesinger v. Reservists Committee* [1974] 418 U.S. 208, S. Ct.
[106] *Massachusetts v. EPA* (n 72) para. 498.
[107] *Ibid*, para. 517.
[108] *Ibid*, para. 498.

In the ongoing *Juliana v. United States* case, where a group of youths claim that the U.S has violated their constitutional rights by its contribution to GHG emissions, the district court and the Ninth Court came to the same conclusion – the claimants fulfilled the requirement of particularized injury. The courts argued that some of the claimants could show personal and concrete injury, for example by having to evacuate due to floods caused by global warming or having to relocate due to water scarcity.[109] However, the issue of standing still remains present in U.S. as many climate related cases are dismissed solely on the ground of lack of particularized injury.[110]

### 3.1.2 The U.K., Canada, New Zealand and Australia

The U.K., Canada and Australia puts less emphasis on the injury and instead prioritizes whether the claimant has genuine interest in the action brought. This approach has allowed for environmental NGOs to a greater extent than in the U.S. being granted legal standing through their interest in environmental issues. In Canada, public interest groups, such as NGOs, can be deemed to have legal standing if they have a genuine interest in the case at hand, based on the NGOs previous interest in similar matters.[111] In Australia, the Environment Protection and Biodiversity Conservation Act allows for any aggrieved person to challenge decisions made under the act, if the person has engaged in the conservation or protection of the Australian environment, thus establishing genuine interest.[112] Furthermore, an NGO can be given standing if it is an established and recognized organization with a relationship with the government (through advice and funding) and clear interest in environmental concerns. Simply demonstrating 'intellectual or emotional concern' for the environment is however not enough for meeting the requirements for standing.[113] The U.K. has approached it in a similar way, requiring "sufficient interest in the matter to which the application relates" for raising locus standi, as stated by the Supreme Court Act of 1981.[114] For an NGO, there are two alternatives for being granted standing: It can either show that all or some of its

[109] See *Juliana v. United States* [2020] 947 F.3d 1159, 9th Cir., para. 1169.
[110] See Brent A. Rosser and Kate Perkins, 'Article III Standing Still Proving to be a Formidable Defense to Environmental Citizen Suits' *National Law Review* (7 September 2021) <https://www.natlawreview.com/article/article-iii-standing-still-proving-to-be-formidable-defense-to-environmental-citizen> accessed 13 May 2022.
[111] See *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236.
[112] The Environment Protection and Biodiversity Conservation Act 1999, section 487.
[113] See *North Coast Environment Council Inc v. Minister of Resources* [1994] FCA 1556, Federal Court of Australia, para. 25, 82; *Environment East Gippsland Inc v. VicForests* [2010] VSC 335 Supreme Court of Victoria, para. 88.; and Joshua D Wilson and Michael McKiterick, 'Locus Standi in Australia – A Review of the Principal Authorities and Where It Is All Going' (unpublished paper, University of Melbourne, 2010).
[114] The Supreme Court Act 1981, section 31(3).

member are being personally affected by the issue at hand,[115] or if the NGO has, as stated by the Supreme Court, an "expert and informed character […] which enable[s] it to present a well-informed challenge to the court".[116] As for New Zealand, there is the recent private climate litigation case *Smith v. Fonterra*, where a group of agriculture and energy corporations were sued for allegedly breaching their duty to cease contributing to climate change. Here, the Auckland High Court departed from 'a liberalising trend' on the matter,[117] by stating that there was "no difference […] between the damage that [the claimant] pleads and the damage that very many others […] may suffer" on the topic of climate change caused by GHG emissions.[118]

### 3.1.3 Europe

For most European countries, as well as for some additional countries in Central Asia and the EU itself,[119] the Aarhus Convention sets the boundaries for legal standing requirements in cases where, as stated by article 9(3) of the convention, the actions of the public and private sector alike "contravene provisions of [the country's] national law relating to the environment".[120] Entered into force in 2001, the convention aims to provide to the public, including NGOs, a right of "access to administrative or judicial procedures" in order to be able to challenge such actions mentioned above, following article 9(3).[121] However, throughout Europe, there is still a vast difference regarding access to courts for NGOs,[122] and the Aarhus Convention Compliance Committee frequently receive complaints from the public regarding non-compliant implementation of the convention, with two of the most topical violators being Germany and Ireland.[123] Germany has at several instances been criticised for its non-compliance with article 9(3) due to its legal order only granting standing to individual persons, a practice recently proven by the public *Neubauer et al.* case. Here, a group of youths and NGOs successfully forced the German government to sharpen its GHG reduction targets, even if the NGOs, as

[115] See *R v HM Inspectorate of Pollution ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.
[116] *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386.
[117] *Great Christchurch Buildings Trust v. Church Property Trustees* [2021] NZHC 3045, para. 69.
[118] *Smith v. Fonterra* (n 16) para. 62.
[119] UN, 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (*UN Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27> accessed 10 April 2022.
[120] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force on 30 October 2001) 2161 U.N.T.S. 447 (Aarhus Convention) art. 9(3).
[121] See also Aarhus Convention (n 120) art. 2(4) of for the definition of 'public'.
[122] Milieu Consulting, *Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final Report* (European Commission, 2009) (*Study on EU implementation of the Aarhus Convention*) p. 102-106.
[123] Aarhus Convention Compliance Committee, 'Communications from the public' (*UNECE*) <https://unece.org/env/pp/cc/communications-from-the-public> accessed 15 May 2022.

mentioned, were found to not have legal standing.[124] As for Ireland, the recent case *Friends of the Irish Environment v. the Government of Ireland* concerned an NGO which argued that the approval of a new mitigation plan would violate the Irish Climate Act and human rights due to not creating sufficient short-term emission reductions. Here, the Irish Supreme Court would not grant the NGO standing as it relied on rights it did not possess. The court also questioned why the NGO had chosen to pursue the claim on its own, instead of providing economic and legal support to individuals whose rights actually could have been violated, thus allowing them to act as claimants.[125] Half of all EU Member States grant legal standing in a manner that conforms with the Aarhus Convention relatively well, while the remaining half puts certain limitations on legal standing that likely violates the convention to different extents.[126]

### 3.1.4 The Global South

Unlike most other regions of the world, courts in countries in the Global South[127] have applied a more lenient approach to legal standing. This could possibly be attributed to a history of more progressive procedural requirements.[128] In the Colombian case *Future Generations v. Ministry of the Environment and Others*, a group of children and young adults successfully filed and won a *tutela*, a constitutional claim regarding fundamental rights, against the government on the topic of deforestation and GHG emissions. While the Colombian legal system does require that the person filing a tutela to be directly affected by the issue,[129] the Colombian Supreme Court simply argued that all future generations, including children and the unborn, are directly affected by climate change.[130] Another public climate litigation case transpired in Kenya, where legal standing was not mentioned other than that the claimants were "aggrieved" by the actions of a governmental authority, indirectly resulting in them having locus standi.[131] In South Asia, public interest litigation has met little resistance in the form of standing requirements and courts have generally applied a very broad interpretation of the requirements in order to assure that standing was granted.[132]

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[124] *Neubauer et al.* (n 46) para. 136.
[125] *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49, para 7.22.
[126] *Study on EU implementation of the Aarhus Convention* (n 122) p. 102.
[127] See note 31 above.
[128] Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9 Transnational Environmental Law 77, p. 19.
[129] *Future Generations v. Ministry of the Environment and Others* [2018] STC4360-2018 Colombia Supreme Court, p. 10-13.
[130] *Ibid*, para. 11.2.
[131] *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.* [2016] 196 of 2016, National Environmental Tribunal at Nairobi, para. 3.
[132] See Setzer and Benjamin (n 128) p. 19.

### 3.1.5 Conclusion

Based on the findings above, it becomes apparent that legal standing is a key issue in both public and private climate litigation throughout the world. The requirements that different legal orders pose on climate litigation claimants can at times be troubling for both individuals and NGOs to meet. This is especially the cases where legal standing is dependent upon the claimant being individually or uniquely affected by an action, which, due to climate change being a global problem affecting all people, creates a nigh impossible hurdle to overcome. Environmental NGOs are in many cases hindered by not being able to claim direct concern or sufficient interest, and where the expertise and reputation of the NGO is not considered, they are instead being forced to rely upon their members' cases for legal standing or to function as a representative *ad litem* to be able to participate in climate litigation. The issue of legal standing becomes even more apparent when considering that climate change will affect future generations in an even more dire way than the generations of today, yet, as the future generations are unborn, they are unable to bring an action.[133] Moreover, nature and the creatures inhabiting it, are also entities gravely affected by climate change, and their continued existence and well-being are for many values that desires legal protection.[134] In cases where parties affected by climate change cannot voice their concern, there is a need for a legal representative arguing their case. This could be assured by either granting NGOs standing to file such cases, or granting future generations and nature itself legal standing and let NGOs or other appointed *ad litem* guardians file claims on the behalf of their need for protection.[135]

## 3.2 Legal basis

The second issue concerns finding legal ground to base a claim upon. As with all litigation, this involves presenting for the court an obligation or right, in this case of the environmental kind, that the action of the defendant threatens to violate or currently violates. The UNEP has mentioned three main sources of such obligations which will create the basis for the following section, namely national laws and

[133] For more on this topic, see Lydia Slobodian, 'Defending the Future: Intergenerational Equity in Climate Litigation (2020) 32:3 Georgetown Environmental Law Review 569.

[134] See for example Tiffany Challe, 'The Rights of Nature – Can an Ecosystem Bear Legal Rights?' (*Columbia Climate School,* 22 April 2021) <https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits/> accessed 15 May 2022; and Mihnea Tanasescu, 'When a river is a person: from Ecuador to New Zealand, nature gets its day in court' (*The Conversation,* June 2017) <https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>, accessed 12 April 2022.

[135] Both of these avenues have been proposed in legal doctrine and in some countries actually applied in legislation and jurisprudence. For 'future generations' see Slobodian (n 133); and *Future Generations v. Ministry of the Environment and Others* (n 129) para. 11.2. For 'nature' see Christopher Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd edition, Oxford University Press, 2010); and Challe, 'The Rights of Nature…' (n 134).

policies, fundamental rights, and tort law.[136] These sources are however not necessarily invoked exclusively and, as has been the trend in recent climate litigation, claims can be based upon several of these sources in conjunction with one another.[137] Moreover, the domestic legal sources may be attributed with the values of international treaties, which, as will be seen in chapter 4, could provide a framework for both the claim and the remedy decided upon by the court.

### 3.2.1 National laws and policies

One such source is obligations stemming from national law and policies. Every country on the globe has by now implemented at least one law or policy on climate change, yet the scope and effectiveness of these acts vary between countries.[138] Where some countries have specific laws or policies for individual areas of climate legislation, such as mitigation, adaptation or compensation, other have more overarching climate acts.[139] The rights and obligations stemming from these are used as the legal basis for more than 75% of all climate litigation actions but has seen most usefulness in public climate litigation cases. Furthermore, while there are no domestic laws allowing for a private action against a polluter based solely on it emitting GHGs, there are nevertheless some ongoing attempts to use national environmental laws as basis for making a private polluter seize with its emissions.[140] One such case is *ClientEarth v. Polska Grupa Energetyczna* where an environmental NGO has sought a court order for Poland's largest private energy company, to seize with its burning of brown coal. The claimant bases its action on article 323 of the Polish Environmental Protection Act which allows NGOs to challenge illegal activity by any entity threating to damage the environment, arguing that GHG emissions causing climate change is adversely affecting the environment as a "public good". The case is still pending.[141] In Germany, the Federal Constitutional Court recently ruled in *Neubauer et al.* that the German Climate Change act had set insufficient reduction goals as it would force future generations to reduce their emission in a disproportionate amount compared to current generations, thus affecting their fundamental freedom according to article

[136] UNEP, *GCLR 2020* (n 50) p. 40-43.
[137] See for example *Milieudefensie* (n 7); *Neubauer et al.* (n 46); and *Notre Affaire à Tous v. Total* (n 21).
[138] Shaik Eskander, Sam Fankhauser, and Joana Setzer, 'Global Lessons from Climate Change Legislation and Litigation' (2021) 2 Environmental and Energy Policy and the Economy 44, p. 58.
[139] See Grantham Research Institute at LSE, 'Laws and policies' (*Climate Change Laws of the World*) <https://climate-laws.org/legislation_and_policies> accessed 18 May 2022.
[140] UNEP, *GCLR 2020* (n 50) p. 41.
[141] Sabine Center for Climate Change Law, 'ClientEarth v. Polska Grupa Energetyczna' (*Climate Change Litigation Database*) <http://climatecasechart.com/climate-change-litigation/non-us-case/clientearth-v-polska-grupa-energetyczna> accessed 5 May 2022. There is also an ongoing claim directed at a subsidiary to PGE based on art. 323 as well, see Grantham Research Institute at LSE, 'Greenpeace Poland v. PGE GiEK' (*Climate Change Laws of the World*) <https://climate-laws.org/geographies/poland/litigation_cases/greenpeace-poland-v-pge-giek> accessed 5 May 2022.

20a of the German Basic Law.[142] The government was therefore required to amend the Climate Change Act with stricter provisions for reducing its current GHG emissions as to not exceed the country's carbon budget too early.[143] This decision sparked three separate actions aimed at different German automakers, where the claimants argue that continued manufacturing and sale of cars with combustion engines is a violation of the claimants' rights, based on the wide interpretation of German national law in *Neubauer et al*. All three cases are pending.[144]

### 3.2.2 Fundamental rights

A second category of obligations are those pertaining to fundamental rights. These are rights for individuals that receive a high degree of protection either from a country's constitution, supreme court rulings or international treaties. While less than 10% of all climate litigation cases historically have been based on fundamental rights,[145] the current trend indicates that an increasing number of plaintiffs base their claim upon fundamental rights in one way or another.[146] A right to a healthy environment has not been a staple fundamental right for nearly as long some other rights, with the concept first being mentioned in the Stockholm Declaration of 1972, and first enshrined in a national constitution in 1976.[147] As of 2017, more than 150 countries all over the world have to different extents established a right to a clean environment in their constitutions.[148] Moreover, regions across the world have created human rights-treaties reflecting their stance on the matter. By now, most of these charters explicitly acknowledge a fundamental right to a healthy environment,[149] or have through court interpretations been attributed with an equivalent protection against adverse effects on the environment.[150] The human rights-treaties are however a matter of international law, and will therefore be dealt with more extensively in section 4.2, but nevertheless required a brief introduction here to provide context for the following section on tort law.

[142] Basic Law for the Federal Republic of Germany, as last amended by 29 September 2020.
[143] *Neubauer et al.* (n 46) headnotes.
[144] See Waldersee (n 46).
[145] UNEP, *GCLR 2020* (n 50) p. 41.
[146] Joana Setzer and Lisa Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10 Wiley interdisciplinary reviews: Climate change, p. 10.
[147] UNGA Res 48/13 (8 October 2021) UN Doc A/HRC/RES/48/13. This can be compared with the Universal Declaration of Human Rights being adopted by the UN in 1948, see UNGA, Res 217 A (10 December 1948) UN Doc A/RES/217(III).
[148] UNEP, *Environmental Rule of Law: First Global Report* (2019, p. 156-159.
[149] See for example African Charter on Human and Peoples' Rights (1982) 1520 U.N.T.S. 217; Arab Charter on Human Rights (2004) 12 Int'l Hum. Rts. Rep. 893, art. 38; and Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1999) A-52 (Protocol of San Salvador).
[150] See section 4.2.

Environmental NGOs have had trouble achieving success in relying upon fundamental rights as only individual citizens may bear such rights in most cases. In *Neubauer et al.,* the claims made by NGOs were dismissed on these grounds.[151] This was also the case in *Friends of the Irish Environment v. the Government of Ireland*, where the Supreme Court dismissed the NGO's claim due to basing it on rights it did not possess, instead requiring a natural person to bring such a claim.[152] Moreover, the impact of fundamental rights extends beyond solely relying on them as legal basis. As can be seen in *Urgenda* and *Milieudefensie*, fundamental rights might also influence other national laws and be considered when "applying and interpreting national-law open standards and concepts", as stated by the District Court in *Urgenda I*.[153] An examination of this will follow.

### 3.2.3 Tort law

The final category of sources is tort law. In the context of climate litigation, this would involve a claimant seeking redress for an entity adversely affecting the environment, thus injuring, or threatening to injure, the claimant's personal rights, interests, or property. By not accounting for the harm to individual rights a contribution to global warming can cause, states or corporations alike can be seen as acting negligently and in breach of their 'duty of care'.[154] A 'duty of care' exists in some legal orders, mainly in common law jurisdictions, but can also be found in some civil law jurisdictions.[155] It can be explained as a duty for a person to act with caution as to not affect another person's interests. Failure to do so, would result in a breach of the 'duty of care'. Here, the interaction between fundamental rights and tort law becomes important – if these rights require the protection against harm towards the environment, the 'duty of care' for individuals rights could be breached through failure to reduce GHG emissions.[156] In *Urgenda I,* the District Court ruled that the Netherlands had such a 'duty of care' stemming from the Dutch Civil Code, and that it extends to reducing GHG emissions following the environmental rights stemming from the ECHR, a decision later confirmed by the Dutch Supreme Court in *Urgenda III*.[157] Later in *Milieudefensie,* The Hague District Court held a private corporation, RDS, to a similar 'duty of care', once again requiring GHG emission reductions.[158] These cases could be seen as proof to the potential of the hybrid approach of tort law and fundamental rights.

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[151] *Neubauer et al.* (n 46) para. 136.
[152] *Friends of the Irish Environment v. The Government of Ireland* (n 125), paras. 7.5, 7.19, 7.24
[153] *Urgenda Foundation v. State of the Netherlands* [2015] ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag (*Urgenda I*), paras. 4.43, 4.46.
[154] Carlo Vittorio Giabardo, 'Climate Change Litigation and Tort Law: Regulation Through Litigation?' (2020) University of Perugia Law School Yearbook 2020 361, p. 366.
[155] See section 5.2.
[156] UNEP, *GCLR 2020* (n 50) p. 43
[157] *Urgenda III* (n 22) paras. 4.46, 4.55
[158] *Milieudefensie* (n 7) paras. 4.4.1-4.4.2. See section 5.1.2.

Despite the popularity of the *Urgenda* rulings,[159] using tort law as legal basis for climate litigation claims seems to not yet have gained traction, with only a handful of cases relying on it over the last few years.[160] In common law jurisdictions, this can be explained by the amount of hurdles a claim would need to overcome.[161] Tort law in common law systems is substantially more complex than in civil law jurisdictions, and in many cases ill-suited for dealing with the issue of climate change.[162] In the case of Australia, and likely other common law countries, Abbs, Cashman, and Stephens argue that some of the main obstacles would include courts refusing to recognize a 'duty of care' where there is no relationship between claimant and defendant, proving a breach of the right and establishing causation between emissions and the alleged injury.[163] These obstacles became apparent in the recent public Australian case *Sharma* regarding the governmental approval of a coal mine. There the Full Federal Court held that due to lack of foreseeability (as to the potential risk of harm the approval of the coal mine might contribute to), governmental control over the harm caused by coal mining, and the relationship between the claimants and the Minister, there existed no 'duty of care' towards the environment for the Minister.[164] However, in some civil law countries, arguments based on tort law has continued to prove fruitful. In *VZW Klimaatzaak v. Kingdom of Belgium & Others*, concerning the Belgium government's weak approach to GHG emission reductions, the Brussels Court of First Instance held that Belgian authorities had breached their 'duty of care' stemming from the Belgian Civil Code.[165] The legal basis for the claim in the ongoing *Notre Affaire à Tous v. Total,* a case where the French fossil-fuel company Total has been targeted for its failure to produce a 'plan of vigilance' to mitigate potential human rights violations, relies on a 'duty of vigilance' resulting from the French Code of Commerce.[166]

### 3.2.4 Conclusion

As has become clear through the above examination of the different sources of environmental obligations, there are multiple foundations one can base their legal claim on. It has also become equally clear that the three discussed alternatives face

[159] The novelty of *Milieudefensie* (n 7) does not allow for such observations yet.
[160] Setzer and Higham (n 6) p. 23-26.
[161] *Ibid*, p. 25.
[162] See Wendy Bonython, 'Tort Law and Climate Change' (2021) 40:3 University of Queensland Law Journal 421, p. 426; and R. Henry Weaver and Douglas A. Kysar 'Courting Disaster: Climate Change and the Adjudication of Catastrophe' (2017) 93 Notre Dame Law Review 295, p. 304-305.
[163] Ross Abbs, Peter Cashman, and Tim Stephens 'Australia' in Richard Lord et al. (eds) *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011) 67, p. 85-100.
[164] *Sharma* (n 47) paras. 7, 335, 745 and 886.
[165] *VZW Klimaatzaak v. Kingdom of Belgium & Others* [2021] 2015/4585/A, Court of First Instance of Brussels, Civil Section (*Klimaatzaak*) para. 2.3.1.
[166] *Notre Affaire à Tous v. Total* (n 21) p. 17-22.

their respective issues. Nation laws or policies, in the context of private climate litigation with the aim of reducing GHG emissions, provide no legal avenue for claimants to instigate actions towards private emitters. Fundamental rights have seen admirable success in public climate litigation and proved to be an important cornerstone in the *Milieudefensie* ruling. However, as environmental NGOs are unable to possess fundamental rights, their access to justice becomes limited. In addition, entities that are unable to bring their own actions are in most countries not seen as bearers of such rights, making it hard or impossible to protect their interests. Finally, tort law has been a key source of law in several important climate litigation cases. It is however difficult to make any definitive statements on its viability as there are too few cases to study, which could possibly hint at it being difficult to phrase a claim based on tort law in other countries than those where actions have been brought. Such is at least the case in most common law jurisdictions, where due to the obstacles it faces, the act of relying on tort law becomes limited.[167]

## 3.3 Causality and attribution

The third issue is one of both logical, legal, and scientific character: Who caused the damage? While some environmental destruction and pollution can be directly attributed to a single state or corporation, such as oil spills and chemical waste, adverse effects created by climate change are exceedingly difficult to link to a specific polluter. All countries, most corporations and most individuals contribute to global warming in some way, be it GHG emissions, deforesting, consumption, or in other manners. Is the destruction caused on the island of Tuvalu due to rising water levels a result of the emissions created by the United States, a small coal power plant in Romania or a person driving a car? A similar inquiry was raised in the aforementioned case *Lliuya v. RWE.* A Peruvian farmer argued that RWE, Germany's largest energy company, is, due to its substantial contribution to global warming, responsible for the melting of a glacier near his home in Peru and should therefore reimburse him for the costs of setting up flood protection.[168] Issues like these regarding causality and attribution have been present in the field of climate litigation since its inception**.** In 2011, Peel highlighted several key problems facing climate litigation on the topic of causality, adding: "These issues are a reflection of the complexities of the problem of climate change".[169] The concepts of '*a drop in the ocean*' and '*death by a thousand cuts*', as well as '*the problem of proof*' will be dealt with in the following section.

[167] See more under section 5.2.
[168] See *Lliuya v. RWE* (n 86).
[169] Peel (n 98) p. 15.

### 3.3.1 A drop in the ocean

Climate change and global warming is caused by anthropogenic emissions of GHGs by countless of entities all over the globe. No one entity is therefore solely responsible for climate change. However, those that emit substantially more GHGs, i.e., Carbon Majors, unarguably play a much larger role in global warming, raising the issue of whether they can be held legally responsible and liable for climate change. As a defence to this proposition, emitters argue that their contribution is but 'a drop in the ocean' globally, therefore exempting them from any far-reaching responsibility.[170] This was the line of reasoning applied by the EPA in *Massachusetts v. EPA*, claiming that the reduction of GHG emissions a new regulation of motor vehicles would create, would only contribute insignificantly to the combating global warming.[171] In *Urgenda II,* the Dutch government argued in a similar manner: Due to the Dutch emissions being only 0.4% of global emissions, any more stringent reduction policies would not have nearly enough effect to solve climate change. The Court of Appeal put the 0.4% figure aside, and instead clarified that the Netherlands is the single largest emitter per capita in the EU and eight biggest in the world.[172] In *Neubauer et al.* the German Federal Constitutional Court referred to the *Urgenda* rulings, stating that "[t]he state may not evade its responsibility [regarding GHG emissions] here by pointing to [GHG] emissions in other states".[173] Since the *Urgenda* ruling and its widespread impact on the field of climate litigation, the 'drop in the ocean' argument has become increasingly legally unsustainable, with courts rejecting this line of logic all over the world.[174]

### 3.3.2 Death by a thousand cuts

The concept 'death by a thousand cuts' was termed within the area of biodiversity protection, meaning that cutting down one tree is not a matter that needs regulation, yet the cumulative effect of cutting down trees does. In the context of climate litigation this entails that a singular act of emitting GHGs is perhaps not substantial enough to validate legal redress, but it should be considered when taking the cumulative effect of emissions into account. Peel argues that the environmental effect of a particular source of emission should be "evaluated in the context of similar actions, past or ongoing, that also contribute to [global warming]."[175] As concerns EIAs, U.S courts seems to have agreed with this approach in their rulings.

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[170] Peel (n 98) p. 16-17.
[171] *Massachusetts v. EPA* (n 71) paras. 523-526.
[172] *Urgenda Foundation v. State of the Netherlands* [2018] ECLI:NL:GHDHA:2018:2610, Gerechtshof Den Haag (*Urgenda II*) para. 26.
[173] *Neubauer et al.* (n 46) para 203.
[174] Manuela Nienhaus, 'Protecting Whose Children? The Rights of Future Generations in the Courts of Germany and Colombia' (*Völkerrechtsblog*, 23 March 2022) <https://voelkerrechtsblog .org/protecting-whose-children> accessed 6 May 2022.
[175] Peel (n 98) p. 17-18.

In *WildEarth Guardians v. U.S. Bureau of Land Management* and *WildEarth Guardians v. Zinke*, judges held that the government was forced to review its impact assessments to account for the cumulative effect of climate change.[176] Similarly in a French case, a court ordered a new study on the cumulative climate effects of a biorefinery project to be undertaken before permit could be given.[177]

As for the climate litigation concerning emission reductions, in *Massachusetts v EPA* the defendants argued that any emission reductions accomplished by the suggested actions would be offset by increased emissions in other parts of the world. The US Supreme Court dismissed this line of argumentation, concluding that "reduction in domestic emissions would slow the pace of global emission increases, no matter what happens elsewhere".[178] The well-mentioned *Urgenda* ruling also contains elements of the 'death by a thousand cuts' issue. The Dutch government argued that climate change needs to be combated by implementation of strict policies all over the world, and to this extent should not be required to sharpen its own regulation. However, the court dismissed this argument, stating that if this line of reasoning was deemed acceptable, all states could argue that if no other states have to take measures it does not have to either, thus resulting in no change being made at all.[179] A similar stance was held in *Neubauer et al.* with the court stating that "It is precisely because the state is dependent on international cooperation […] that it must avoid creating incentives for other states to undermine this cooperation."[180] The *Milieudefensie* ruling also expanded these concepts to include private entities, as the court argued that the fact that achieving the Paris Agreement objectives is uncertain "do[es] not absolve RDS of its individual responsibility regarding the significant emissions over which it has control and influence" and alleging that there is international consensus regarding the need for independent emission reductions by corporations and states alike in order to reach the Paris Agreement goals.[181] On the other end of the spectrum, the court in the *Sharma* case held that a Minister who approved a coal mine did not have control over the harm further GHG emissions could cause as climate change is a global catastrophe, adding that there were "countless others around the world" who could mitigate the risk of harm.[182]

[176] See *WildEarth Guardians v. U.S. Bureau of Land Mgmt* [2020] 457 F. Supp. 3d 880, D. Mont.; and *WildEarth Guardians v. Zinke* [2019] 368 F. Supp. 3d 41, D.D.C, respectively.
[177] See *Friends of the Earth et al. v. Prefect of Bouches-du-Rhône and Total* [2021] 1805238, Tribunal Administratif de Marseille.
[178] *Massachusetts v. EPA* (n 71) paras. 525-526.
[179] *Urgenda II* (n 172), para. 64.
[180] *Neubauer et al.* (n 46) para 203.
[181] *Milieudefensie* (n 7) para. 4.4.52.
[182] *Sharma* (n 47) para 335.

### 3.3.3 The problem of proof

In the eyes of Peel, the most difficult challenge in climate litigation is attributing specific impact or damage to the emissions by a particular emitter, facility, or activity. In tort law, there is a general need to establish causality between the defendant's conduct and the claimant's injury. In civil law, lack of causality could impact the legal standing or legal basis for the claim. However, already in 2011 had courts all over the world begun to acknowledge the difficulty of attributing environmental impact to a specific emission and did therefore in many cases not require, as phrased by Peel, the "step-by-step proof of causal chains" otherwise required in similar cases.[183] Apart from being a legal problem, the issue also has a significant scientific dimension and the progress made within the field of attribution science since Peel's article has had important impact on this issue. During the 2010s, attribution scientists honed in on single extreme weather events, resulting in it now being possible to visualize how emissions affect heatwaves, storms, and heavy rainfall. There has also been progress made on identifying the social and economic impact that climate change has on human society.[184] However, much remains to be done in this area.

In *Lliuya v. RWE*, the Peruvian farmer's claim was eventually dismissed. The court stated that due to the fact that "innumerable […] emitters release GHGs, which merge indistinguishably with each other […] it is impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage".[185] The Australian case *Sharma* also makes the incompatibility of tort law and climate change clear in the context of causation. The court held that the approved permit could 'increase the risk' of harm, yet 'not risk contributing' to the harm, which could constitute a breach of a 'duty of care'.[186] In other words, the court argued that global warming has a risk of harming the claimants but increasing this risk through emissions does not violate the 'duty of care'. An approach that could bypass the issues surrounding causality was utilized in *Milieudefensie*, as the claimants, instead of relying on transpired harm, held RDS responsible for mitigating risks of future climate damage.[187]

[183] Peel (n 98) p. 18-19.
[184] Mechler et al. (n 75) p. 129, 133.
[185] Lliuya v. RWE (n 85), p. 6. The case is pending an appeal.
[186] *Sharma* (n 47) para. 886.
[187] See Quirin Schiermeier, 'Climate science is supporting lawsuits that could help save the world' (2021) 597 *Nature* 169, <https://www.nature.com/articles/d41586-021-02424-7#ref-CR4> accessed 14 May 2022.

# 4 International law and its possibilities

Climate litigation has always been dependent on international law, yet its influence has not always been of the legal nature. Instead, it is the success and failure of international environmental law in combating climate change that has inspired the progress of climate litigation.[188] The first set of climate litigation cases back in the 1900s, with close to all cases being in the U.S., were mostly challenges to actions taken contrary to national law. Following the build-up and aftermath of the Kyoto Protocol in 1997, public interest in climate litigation grew, and the practice began turning towards questions regarding climate change, such as mitigation, adaptation, and the loss and damage stemming from it. Later, the failure of the Copenhagen Conference of 2009 had similar effect.[189] The failures of governments to effectively deal with the ever-growing threat of global warming caused legal and environmental scholars to begin investigating the possibilities for actors other than the states to combat climate change, further illustrating the influence international law asserted on climate litigation during this time.[190] By 2015, international law had begun to show direct influence on climate litigation. The Paris Agreement, although not necessarily strictly binding,[191] became a staple in setting the outer limits for what is required by states in terms of GHG emission reductions. At the same time, human rights-treaties began incorporating the protection against environmental hazards into them, pulling climate change concerns into an already well-established legal regime.[192] A few years later, the influence of international law began to extend to private climate litigation, ultimately leading to the *Milieudefensie* ruling.[193] In this chapter, the possibilities international law has created for private climate litigation will examined, focusing on the Paris Agreement and human rights-treaties, i.e. the ICCPR, the ECHR and the UNGP.

## 4.1 Climate litigation and the Paris Agreement

### 4.1.1 The stakes, the objectives and the means

Since the emergence of global international environmental law, following the Stockholm Conference in 1972, clear progress has been made towards a more sustainable environment. As the knowledge of anthropological effects on the environment has increased, numerous treaties have been created, joined, and ratified, and several international environmental organs have been established, each

[188] Golnaraghi et al. (n 14) p. 14-15.
[189] *Ibid*, p. 17.
[190] Peel and Osofsky, 'Climate Change Litigation' (n 54) p. 8.2.
[191] See section 4.1.1 and note 203 below.
[192] See section 4.2 below.
[193] See chapter 5.

with the purpose of ensuring a better environment. In the field of climate change specifically, one of most substantial treaties that has been established is the Paris Agreement. Based upon the framework of the UNFCCC, the Paris Agreement in 2015 successfully unified the states of the world[194] in the pursuit of halting further increase of the global temperature through the reduction of GHG emissions. The main objective of the Paris Agreement is to ensure that the global average temperature stays below an increase of 2°C based on pre-industrial levels. Its secondary objective is to limit the increase to 1.5°C.[195] These numbers were based upon an IPCC report that established that any increase beyond 1.5°C by 2100 would have severe and possibly catastrophic effects on the climate and thus the planet.[196] In order to avert such an increase, global GHG emissions should by 2030 be cut by roughly 45%.[197] The Paris Agreement does however not require each party to the agreement to cut their emissions by a fixed percentage. Instead, parties are required to individually set their own GHG emission reduction targets and specify the actions taken in pursuit of reaching them – their nationally determined contributions ("NDCs"). These NDCs should aim to reflect a party's "highest possible ambition" and "common but differentiated responsibility" as concerns the environment. In order to achieve these NDCs, parties need to implement domestic mitigation measures.[198] The NDCs are then to be communicated to the COP as well as updated every five years to reflect the increased ambition of the state concerned.[199] By November 2021, 151 states had communicated new or updated NDCs.[200] However, as will be seen below, these are still insufficient for achieving the objectives set by the Paris Agreement.

The current NDCs, and the national policies that have been implemented based on these, puts the current trajectory at an estimated increase of 2.9°C by 2100. This increase would still be severely higher than the required 1.5°C, yet lower than the estimate of an increase of 4°C back in 2014 before the Paris Agreement.[201] The overall progress is clearly moving in the right direction, at least when examining the NDCs, only at a slower speed than required. Yet the Paris Agreement and the resulting NDCs and national environmental policies are of little importance if the

[194] 193 states are currently parties to the convention, see UN, 'Paris Agreement' (*UN Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 12 May 2022.
[195] The Paris Agreement, art. 2.1.
[196] IPCC, 'Summary for Policymakers' in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II* (2014) Ch. 19, mainly p. 1082-1083.
[197] IPCC, '*Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels…*' (2018) (*IPCC Special Report*) para. C.1.
[198] The Paris Agreement, arts. 4.2 and 4.3.
[199] *Ibid,* arts. 4.2 and 4.9.
[200] UN Climate Change Secretariat, 'Message to Parties and Observers' (2021) NDCs/Synthesis Report, available at <https://unfccc.int/sites/default/files/resource/message_to_parties_and_observers_on_ndc_numbers.pdf> accessed 13 May 2022.
[201] Plumer and Popovich (n 4).

concerned legal subjects do not adhere to them. All over the world, states are neglecting their NDCs by not implementing national policies that are sufficient enough to meet their set reduction targets for 2030.[202] This can likely be attributed to the treaty not being stringent enough and insufficiently binding upon its parties, which has been criticised by environmentalists.[203] Per a UN report of 2021, six of the G20 members are heading towards not achieving their previously pledged targets[204] based on their current national policies.[205] Additionally, many states are yet to submit new or updated NDCs,[206] or have in some cases submitted NDCs that are equally ambitious or less ambitious than previous NDCs.[207] While private emitters, including corporations, are not bound to the Paris Agreement, and therefore not required to reduce their emissions accordingly, the emission targets and measures implemented by the states forces corporations to indirectly act in accordance with the treaty. In the cases where parties violate their duties under the Paris Agreement, the effect ripples into the private sector, resulting in both public and private entities acting against the interests of combating global warming. It is however difficult to enforce the Paris Agreement, especially since the treaty itself imposes no sanctions on the states being Party to it if not upheld, and private entities are as mentioned not bound by it.[208] Democratic elections are a possible avenue to create change in most countries, but the issue of climate change would be competing with a myriad of other issues that voters might prioritize and could very well prove both non-successful and slow.[209] Instead, climate litigation has become an important tool for enforcing the values represented by the Paris Agreement.

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[202] UNEP, *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered* (2021 (*EGR21*) p. 14-16.

[203] See Lila MacLellan, 'Is the Paris Climate Agreement legally binding? Experts explain' (*World Economic Forum,* 22 November 2021) <https://www.weforum.org/agenda/2021/11/paris-climate-agreement-legally-binding/> accessed 18 April 2022.

[204] Unconditional NDCs submitted closely following the establishment of the Paris Agreement, yet to be updated.

[205] *EGR21* (n 202), p. 14-16.

[206] See note 200 above,

[207] *EGR21* (n 202), p. 14-16.

[208] The agreement does contain a compliance mechanism, but it consists of a committee that is required to act in a facilitative and "transparent, non-adversarial and non-punitive" manner. See the Paris Agreement, art. 15.

[209] As an example, the Australian election of 2019 was dubbed the 'climate election' as the opposition campaigned on increased environmental commitments. While about 52% of the Australian voters saw climate change as an 'important' issue, only 13% saw it as the 'most important' issue. In the end, the sitting government was returned to power with no further environmental ambitions, see Rebecca Colvin and Frank Jotzo, 'Australian voters' attitudes to climate action and their social-political determinants' (2021) 16:3 PLOS ONE. Coincidentally, the Australian election of 2022 took place during the writing of this thesis, and this time the voters outed the sitting government in favour of a government promising stronger action on climate change, see Hilary Whiteman, 'Australian voters deliver strong message on climate, ending conservative government's 9-year rule' *CNN* (22 May 2022) <https://edition.cnn.com/2022/05/21/australia/australia-election-results-morrison-albanese-intl-hnk/index.html> accessed 22 May 2022.

### 4.1.2 The impact on climate litigation

The Paris Agreement has since its inception had vital impact on climate litigation, and in many cases the treaty plays an essential role, regardless of the claimants basing their claim around it or barely referencing it. Furthermore, as evidenced by *Milieudefensie*, the obligations stemming from the treaty may even indirectly extend to private entities. Preston has in two separate articles identified several ways in which the Paris Agreement has affected climate litigation, and those deemed relevant to the topic of private climate litigation will be discussed below.[210]

Firstly, the establishment of the Paris Agreement has resulted in a global and unified stance on the dangers of climate change, the objectives that need to be met in order to avert it, and the measures required for meeting the objectives. According to Preston, this has influenced climate litigation in a few ways. The Paris Agreement has made it clear that all emissions are of consequence, possibly making it harder for defendants to argue that their contribution is but 'a drop in the ocean'.[211] Furthermore, arguments concerning the market adapting to stringent climate laws, and that emitting activities will just relocate to jurisdictions with more lenient regulation, are made more difficult. Also, since all countries must act and present those actions in a transparent manner, it has become possible to compare emission reductions and levels of ambition between different countries or regions. This allows for courts to consider whether the current actions and ambition levels conform with those of other countries, likely creating more incentive for the court to rule favourably or unfavourably towards the defendant depending on the outcome of the comparison.[212]

Secondly, the Paris Agreement influences courts' application and interpretation of environmental norms. In cases where the treaty has been incorporated into domestic laws and policies, courts may determine whether an action by a government or private entity is in accordance with such regulations, thereby indirectly applying the Paris Agreement onto the case.[213] Moreover, in cases where the treaty has not been incorporated, it may still provide a reference point for judges to rely upon when interpreting environmental law, putting the disputed actions into an international climate change policy context. According to the UNEP, this "makes it easier […] to characterize those actions as for or against both environmental needs

[210] Brian J. Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2020) 33:1 *Journal of Environmental Law* 1 ('Influence of the Paris Agreement, part I'); and Brian J. Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part II)' (2020) 33:2 *Journal of Environmental Law* 227 ('Influence of the Paris Agreement, part II').
[211] Preston, 'Influence of the Paris Agreement, part I' (n 210), p. 15. See also section 3.3.1 above.
[212] *Ibid*, p. 14-19.
[213] *Ibid*, p. 19-25.

and stated political commitments."[214] The targets and objectives of the Paris Agreement may also set the boundaries for what a court might considered allowable, and that any actions threatening to hinder the achievement of these objectives should be deemed unlawful.[215] This has been the case in many landmark rulings such as *Urgenda I,*[216] *Milieudefensie*[217] and *Neubauer.*[218] Additionally, in *Greenpeace Norway v. Ministry of Petroleum and Energy,* the court stated that "International agreements will […] be able to contribute to clarifying what is an acceptable tolerance limit and appropriate measures."[219]

Thirdly, the Paris Agreement affects corporate governance, both directly and indirectly. In order to achieve the NDCs countries are required to set by the treaty, they naturally must implement different measures. When measures regarding emission reductions are implemented, they create an immediate requirement for a shift in corporate governance towards less emitting activities. The establishment of the Paris Agreement also represents a globally agreed upon turn towards sustainability and carbon neutrality, meaning that more measures regarding emission reductions will be forced to follow in the future, creating incentive for corporations to begin steering away from emitting activities. In other words, corporations will be required to transition towards carbon neutrality, and climate litigation could be utilized to ensure or perhaps expedite this process.[220] In *Milieudefensie,* RDS argued that the transition is not only dependent on corporations but on society as a whole. The District Court agreed, but added that "there is a broad international consensus that it is imperative for non-state actors to contribute to emissions reduction" and that "RDS does bear an individual responsibility, which it can and must effectuate through its corporate policy."[221]

## 4.2 The turn towards rights-based climate litigation

According to the Hague District Court presiding over the *Milieudefensie* case, there is now a "widespread international consensus that human rights offer protection against the impacts of dangerous climate change".[222] However, such was not always the case. During the days of early climate litigation there had not yet been made a connection between climate change and adverse effects on human rights. The climate litigants of that time faced multiple obstacles when attempting to rely on

[214] UNEP, *The Status of Climate Change Litigation – A Global Review* (2017) p. 8-9
[215] Preston, 'Influence of the Paris Agreement, part I' (n 210), p. 19-25.
[216] *Urgenda I* (n 153) paras. 7.2.9-7.2.10.
[217] *Milieudefensie* (n 7) paras. 4.4.13, 4.4.52.
[218] *Neubauer et al.* (n 46) paras. 204, 209-210.
[219] *Greenpeace Norway v Ministry of Petroleum and Energy* [2020] No 18-060499ASD-BORG/03 Borgarting Court of Appeal, para 24.
[220] Preston, 'Influence of the Paris Agreement, part II' (n 210) p. 239-243.
[221] *Milieudefensie* (n 7) paras. 4.4.51-4.4.52.
[222] *Ibid*, para. 4.1.3.

rights-based argumentation, including establishing causality, connecting the encroachment of their fundamental rights to climate change, protecting their rights against emissions outside their place of jurisdiction, and using fundamental rights-based arguments on climate change impacts that are yet to happen. This inevitably led to there being little success seen in early human rights-based climate litigation cases, and as such, claimants sought to rely on other environmental obligations as legal basis.[223]

In 2018, Peel and Osofsky argued that since the early days of climate litigation, the practice has taken a 'rights-turn', as evidenced by the *Urgenda* and *Leghari* rulings, among others.[224] There is a number of reasons for this shift, a few of which will be discussed below. First of all, the human rights regime has existed for far longer than the climate change legal regime,[225] and is therefore more established and robust. This could reduce the novelty of climate change grievances, and thereby allowing claimants to phrase their claims in terms that courts can relate to. It also opens up new legal opportunities as concerns argumentation, legal standing, and remedies.[226] Furthermore, the advances within the field of attribution science since the early 2010s have resulted in it being feasible to view the adverse impact climate change has on social, economic and health factors,[227] thus making it possible to legally assess how climate change affects these types of fundamental rights. Finally, by phrasing the impacts of climate change as human rights violations, the very complex and abstract concept of climate change could be made more understandable for those not already convinced of the dangers of global warming.[228] Similarly, fundamental rights exist in all countries and regions, and mostly utilize similar language and principles, making it possible to transfer the findings in rights-based cases between jurisdictions, and in turn influence judicial decisions in other countries.[229]

However, this turn would not have been possible if human right-treaties had not begun to acknowledge climate change concerns. As mentioned in section 3.2.2, most human right-treaties explicitly acknowledge the protection against adverse effects on the environment as being a human right. One important treaty that does not do so is the ECHR. Instead of introducing new articles, or amending existing ones, into the text of the ECHR, the convention has instead been incorporated with environmental values through interpretations by the European Court of Human

[223] Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 48) p. 46, 48.
[224] *Ibid*, p. 60-61.
[225] See note 147 above.
[226] Setzer and Vanhala (n 146), p. 11.
[227] Mechler et al. (n 75) p. 133.
[228] Setzer and Vanhala (n 146), p. 11.
[229] See Dena Adler et al., *Climate Change, Coming Soon to a Court Near You – Report Three: National Climate Change Legal Frameworks in Asia and the Pacific* (Asian Development Bank, 2020) p. 16.

Rights ("ECtHR"). This can mainly be seen in article 2, concerning 'the right to life', and article 8, concerning 'the right to respect for private and family life'.[230] Following the court's rulings in several cases, it can deduced that article 2 of the ECHR requires states to take appropriate measures to safeguard its citizens against hazardous industrial activities and natural disasters.[231] As for article 8 of the convention, the ECtHR has interpreted the right as it extends to the protection against environmental hazards, due to them possibly affecting a person's private life in a detrimental manner.[232] While the ECtHR itself has not stated that these rights extend to the protection against dangerous climate change, the Dutch Supreme Court in *Urgenda* held that articles 2 and 8 of the ECHR encompassed such protection.[233]

On the international level, countries have shown reluctance to establish a binding human right to a healthy environment.[234] However, similar to how the ECtHR has incorporated such rights into the ECHR, the UN Human Rights Committee has through case law expanded the area of article 6 and 17 of the ICCPR.[235] In another case, the committee has stated that "climate change […] constitute[s] [one] of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[236] Additionally, the UN Special Rapporteur on Human Rights has in 2019 stated that it is globally agreed that human rights-norms now extend to climate change.[237] Most recently, in October 2021, the UN Human Rights Council recognized "the right to a clean, healthy and sustainable environment as a human right" in a non-binding resolution.[238] While this acknowledgement serves as an important milestone in connecting human rights to environmental rights, the legal value of this resolution has not yet been legally assessed by a court.

Finally, while the above human rights-treaties only concern the relationship between states and their citizens, there is an international instrument concerning the protection of human rights by corporations, the UNGP. Endorsed by the UN Human Rights Council in 2011, the instrument sets out to establish the interconnectivity

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[230] The ECHR (n 19), art. 2 and 8.
[231] ECtHR, *Guide on Article 2 of the European Convention on Human Rights: Right to life* (31 December 2021) paras. 37-42.
[232] ECtHR, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence* (31 August 2021) paras. 158-166.
[233] *Urgenda III* (n 22), paras. 5.6.3-5.7.1.
[234] See Yann Aguila, 'The Right to a Healthy Environment' (*IUCN,* 29 October 2021) <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>, accessed 13 May 2022.
[235] See *Portillo Cáceres and Others v.* Paraguay [2016] Decision by the UN Human Rights Committee, UN Doc. CCPR/C/126/D/2751/2016, paras. 7.1-8.
[236] *Ioane Teitiota v. New Zealand* [2020] Decision by the UN Human Rights Committee, UN Doc. CCPR/C/127/D/2728/2016, para 9.4.
[237] See UN Human Rights Office, *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment* (2019) UN Doc. A/74/161, Acknowledgements.
[238] UNGA, Res 48/13 (n 147) para. 1.

between business enterprises (corporations) and human rights.[239] The principles state that "business enterprises should respect human rights" meaning that "they should avoid infringing on the human rights of others and address adverse human rights impact with which they are involved."[240] Moreover, the UNGP does not set out any human rights itself, but instead refers to "internationally recognized human rights", including the ICCPR.[241] While the UNGP, due to lacking an enforcement mechanism, at best can be considered a 'soft law' instrument, its wide endorsement by governments globally has given it an important legal role in the matter.[242] Moreover, the European Commission has explicitly stated that it expects corporations in the EU to adhere to the UNGP.[243]

[239] UNGP (n 20), p. iv, 1.
[240] *Ibid,* principle 11.
[241] *Ibid,* principle 12.
[242] See Noura Barakat, 'The U.N. Guiding Principles: Beyond Soft Law (2016) 12:3 *Hastings Business Law Journal* 591, p. 613.
[243] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility* (2011) COM/2011/0681, para. 12 (d).

# 5 *Milieudefensie* and beyond

Golnarghari et al. held in April 2021, a month before the *Milieudefensie* verdict, that private climate litigation was currently in its second wave.[244] The ruling by the Dutch court has, however, marked the end to the long-standing streak of losses for claimants in private climate litigation cases. Several legal scholars have during the 2010s suggested that one favourable decision in a private climate litigation case could open the floodgates for significantly more success in the field.[245] *Milieudefensie* might just prove to be that case, as the potentially widespread impact the ruling could have has also been discussed greatly in recent legal doctrine, as will be seen in sections 5.1.4 and 5.2. As such, *Milieudefensie* could potentially be seen as the start of a third wave of private climate litigation, acting as the foundation for which future claimants base their argumentation upon. However, whether one choses to label the period post-*Milieudefensie* as the third wave or to simply regard the verdict as a high point of the second wave, makes minor difference. The importance of *Milieudefensie* will remain, and continue to serve as both the culmination of the progress private climate litigation has seen throughout the first and second wave, and the beacon future private climate litigation claimants, and courts, will draw inspiration from.

In this chapter, the *Milieudefensie* case will be examined in depth. The previously discussed obstacles of domestic law and possibilities of international law will help provide context to the court's different considerations and conclusions. The chapter ends with a discussion on the potential legacy of *Milieudefensie*, and what the future might hold for private climate litigation.

## 5.1 *Milieudefensie et al. v. Royal Dutch Shell plc.*

### 5.1.1 Background and general considerations

In April 2019, the environmental NGO Milieudefensie ('Friends of the Earth Netherlands'), a number of other NGOs, as well as the 17 000 individuals represented *ad litem* by Milieudefensie, filed a lawsuit against Royal Dutch Shell (RDS)[246] at the Hague District Court in the Netherlands.[247] RDS is the parent

[244] Golnaraghi et al. (n 14) p. 17.
[245] See Ganguly et al. (n 51) p. 845, 862; Joana Setzer and Rebecca Byrnes, *Global trends in climate change litigation: 2020 snapshot* (Grantham Research Institute on Climate Change and the Environment, LSE, 2020) p. 22; Elizabeth Meager, 'Climate litigation is coming for the private sector' *Capital Monitor* (15 April 2021) <https://capitalmonitor.ai/institution/asset-owners/climate-litigation-is-coming-for-the-private-sector-2/> accessed 11 May 2022; and Peel and Markey-Towler (n 39) p. 1497.
[246] Royal Dutch Shell plc has since then changed its name to Shell plc, see section 5.1.4.
[247] *Milieudefensie* (n 7) paras. 1.1-2.1.8

company of the Shell group,[248] a multinational corporate group operating in more than 70 countries,[249] with global CO2 emission contributions amounting to 60 million tonnes for the year 2021.[250] To put it into context, the Shell group produces roughly six times the amount of CO2 emissions that Madagascar, Haiti and Iceland produce together, or the same amount as the entirety of Austria.[251] To this end, Milieudefensie et al. sought a ruling from the Dutch court:

> "[T]o order RDS, both directly and via the companies and legal entities […] with which it jointly forms the Shell group, to limit […] the aggregate annual volume of all CO2 emissions […] to such an extent that this volume at year-end 2030 principally will have reduced by at least 45% or net 45% relative to 2019 levels…"[252]

Milieudefensie et al. claimed that the CO2 emissions of the Shell group constituted and unlawful action against the claimants, and that RDS therefore must reduce its emissions "in accordance with the global temperature target of […] the Paris Agreement".[253] This claim drew, according to the claimants, its legal basis from RDS having violated its obligation to reduce CO2 emissions by 2030, stemming from the unwritten standard of care found in the Dutch Civil Code.[254] According to Milieudefensie et al., this standard of care should be interpreted in the light of numerous legal instruments and principles, an approach to which the court mostly agreed with. RDS defended itself by opposing the court allowing the claim posed by Milieudefensie et al., challenging the claimants' legal standing, the legal basis of the claim, as well as the court's role in solving the problem (of climate change), arguing that it should be the legislator's duty. The court quickly dismissed the last of these challenges, stating that it is indeed the court's obligation to assess the claims of Milieudefensie et al.[255]

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[248] The Shell group as such ceased to be in 2005 when Royal Dutch Petroleum and Shell Transport & Trading merged into 'Royal Dutch Shell', with RDS being the direct or indirect shareholder in all its subsidiaries, see BBC, 'Shell shareholders approve merger' (*BBC,* 28 June 2005) <http://news.bbc.co.uk/2/hi/business/4628983.stm>, accessed 10 May 2022. The wording "Shell group" is not used by RDS itself, but it is the term used by the Hague District Court to describe RDS and all its holdings (see *Milieudefensie* (n 7) para. 2.2) and is therefore the term I have selected to use in the same context.

[249] Shell, 'Who we are' <http://www.shell.com/about-us/who-we-are.html> accessed 7 May 2022.

[250] Shell, 'Greenhouse Gas Emissions', <https://www.shell.com/sustainability/transparency-and-sustainability-reporting/performance-data/greenhouse-gas-emissions.html> accessed 7 May 2022.

[251] See Global Change Data Lab, 'Annual CO2 emissions' (*Our World in Data*) <https://ourworldindata.org/grapher/annual-co2-emissions-per-country?tab=table&facet=none&country=~OWID_WRL> accessed 7 May 2022. Figures as of 2020.

[252] *Milieudefensie* (n 7) para. 3.1.2.

[253] *Ibid,* para. 3.1.1.

[254] The Civil Code of the Netherlands (1992) art. 6:162.

[255] *Milieudefensie* (n 7) paras. 4.1.2-4.1.3. The court's short retort concerning its law-making capacity has since then been criticised, see section 5.1.4.

This was followed by the court addressing the issue of legal standing.[256] Dutch law allows for class actions by associations, including NGOs, for protecting public interests which are impossible to individualize, arising from a larger group of people, sharing these 'similar interests'. The court stated that preventing climate change by CO2 emission reductions is such an interest. However, these similar interests must also be able to be 'bundled', i.e., combined into one shared class action, as to "safeguard an efficient and effective legal protection of the stakeholders."[257] The court argued that protecting the interests of all current and future generations globally does not allow bundling, due to climate change affecting people differently both as to the 'when' and 'how'. However, both current and future generations of the Netherlands will likely all be affected by climate change in a similar manner and timeframe, which would make their interests suitable for bundling. This affected the question of legal standing due to class actions only being able to be brought by associations which have the objective of promoting such interests. All NGOs acting as claimants, apart from the association ActionAid, aimed to protect Dutch interests. ActionAid, however, operates mainly in Africa, thereby not protecting Dutch residents, resulting in its part of the claim being declared not allowable.[258] As for the 17 000 individuals that were represented by Milieudefensie *ad litem*, they were found to not have the 'sufficiently concrete individual interest' needed, as the protection of their interests were the same interests pursued by the NGOs and their class actions.[259] In conclusion: Most of the claimants were found to have legal standing, allowing the case to proceed.

### 5.1.2 The unwritten standard of care

After having decided that Dutch law was applicable to the case,[260] the court began addressing the potential environmental obligation that RDS was said to have violated. In Dutch law, as mentioned, there exists an unwritten standard of care, stemming from article 6:162 of the Dutch Civil Code**,** which, as stated by the court, outlaws "acting in conflict with what is generally accepted according to unwritten law".[261] This domestic standard of care must therefore be interpreted in the light of relevant circumstances in order to establish what is 'generally accepted' and 'unwritten law' as concerns CO2 emissions. The court decided upon 14 different

[256] See more under section 3.1.
[257] *Milieudefensie* (n 7) para. 4.2.2.
[258] *Ibid,* paras. 4.2.3-4.2.5.
[259] *Ibid,* para. 4.2.7.
[260] *Ibid,* paras. 4.3.1-4.3.7. The thesis has not addressed the issue of applicable law previously, as applicability is not necessarily a problem with a unique 'climate litigation-dimension', and will therefore refrain from an in-depth examination of the court's considerations in this matter. It does however contain several elements of 'parent company liability' and 'corporate policy setting', which will discussed under section 5.1.3.
[261] See also section 3.2.3 regarding tort law generally.

aspects that it would consider in this interpretation.[262] While the court made no attempt in categorizing these aspects, I have decided to do so in order to maintain coherency throughout these sections.[263] Departing from the numbering of aspects that the court used,[264] I have divided the factors into two groups: Those setting the boundaries for what can be considered 'generally accepted unwritten law',[265] and those establishing the extent to which RDS needs to reduce its emissions.[266] The former of these will continue to be explored in this section, while the latter will be examined in section 5.1.3 below.

On the topic of interpreting the unwritten standard of care, the court clarified the threat that climate change poses to the Netherlands and the Dutch people residing there, pointing to the scientific research made earlier in the ruling.[267] Alongside general adverse effects of climate change, such as droughts, famine, and diseases, the Netherlands is, due to its costal location, especially vulnerable to a potential sea level rise which would cause devastating flooding throughout the country, likely leading to issues concerning sanitation and water shortage. RDS held that these consequences did not factor in potential adaptation strategies, such as flood walls and air conditioning, which would reduce the actual risk that climate change poses. Deflecting this argument, the court stated that "these strategies do not alter the fact that climate change due to CO2 emissions has […] potentially very serious and irreversible risks for Dutch residents…"[268] With the potential physical threat to Dutch residents established, the court looked towards international legal instruments to find what rights and obligations this threat might affect.

[262] *Milieudefensie* (n 7) paras. 4.4.1-4.4.2.
[263] In my view, the structuring of the judgement leaves a lot to be asked for, with especially the conclusions many times being drawn before the considerations, and the aspects of the unwritten standard of care not being bundled into groups regarding the same matter (such as the ones suggested in notes 264-266 below). While this is a subjective opinion, the thesis benefits from departing from the traditional sequential run through of the judgement's paragraphs, and instead deals with the considerations in a manner that is consistent and coherent in the context of the previous issues examined by the thesis.
[264] This means that the numbering used by the court (see *Milieudefensie* (n 7) para. 4.4.2) has been abandoned. The references to the numbered aspects in notes 265 and 266 below are only for the reader's convenience, and should therefore not be interpreted as that a numbered aspect will be explicitly addressed under the given section. Furthermore, some aspects are relevant for both sections and will be mentioned accordingly, while other aspects will not be mentioned at all due to them overlapping with other aspects.
[265] These aspects mostly regard which values RDS's actions might threaten, mainly human rights, stemming from aspects 3-5 as numbered by the court.
[266] These aspects mostly regard RDS's responsibility for the Shell group or how much RDS needs to reduce its emissions, stemming mainly from aspects 1-2 and 6-14 as numbered by the court.
[267] See *Milieudefensie* (n 7) para. 2.3-2.4.
[268] *Ibid,* para. 4.4.8.

***The ICCPR and the ECHR***

The Hague District Court began with discussing the ICCPR and the ECHR, and how the rights stemming from these may be affected by climate change. Both treaties include the right to life,[269] and the right to respect for private and family life.[270] These rights have however been extended beyond their strict wording to involve an environmental dimension. In the case of the rights stemming from the ECHR, the court pointed to the *Urgenda* ruling, and stated that, based on the ruling, "it can be deduced that Articles 2 and 8 of the ECHR offer protection against the consequences of dangerous climate change due to CO2 emissions".[271] In *Urgenda,* the Supreme Court had examined the environmental dimensions of the ECHR, and found that, the ECtHR had through its rulings introduced environmental values into articles 2 and 8 of the ECHR, as mentioned above by the thesis.[272] This allowed the Supreme Court to attribute the protection of human rights against climate change, to the 'duty of care' concerned in *Urgenda*.[273] As for the ICCPR, the Hague District Court identified the expansions the UN Human Rights Committee had made of articles 6 and 17, arguing that the rights stemming from these articles encapsulated protection against climate change.[274]

Human rights could therefore, according to the Hague District Court, be said to contain a right to be protected from the consequences of adverse climate change, and that continued CO2 emissions did in fact threaten the human rights of Dutch residents. However, as both the ICCPR and the ECHR only applies to the relationship between citizens and states, the treaties could not generate any obligations for RDS against the Dutch citizens. The court nevertheless concluded that these treaties should factor into the interpretation of the unwritten standard.[275] Although not outright stated by the court, I assume that it considered the interpretational value of the ECHR and the ICCPR, as concerns a "generally accepted unwritten law" for corporations, to be inadequate on its own, as these treaties only regard the relationship between citizens and states. In order to bridge the gap between human rights and corporations, the court looked to the UNGP.

***The UNGP***

As mentioned under section 4.2, the UNGP concerns the relationship between corporations and human rights. While only constituting 'soft-law', it has nevertheless received wide endorsements, both by the UN Human Rights Council which adopted the principles unanimously, but also by the EU.[276] While RDS itself

[269] ECHR (n 19) art. 2; and ICCPR (n 90) art. 6.
[270] ECHR (n 19) art. 8; and ICCPR (n 90) art. 17.
[271] *Milieudefensie* (n 7) para 4.4.10.
[272] See *Ibid,* para. 4.2.
[273] *Urgenda III* (n 22) paras. 5.2.2-5.2.5.
[274] *Milieudefensie* (n 7) para. 4.4.10.
[275] *Milieudefensie* (n 7) paras. 4.4.9-4.4.10.
[276] UNGP (n 20) p. iv. See also note 242 regarding the EU.

has not committed to following the UNGP, it has stated that it supports the principles.[277] Due to the universal endorsement of the UNGP, the court argued that the instrument was a suitable guideline for interpreting what is 'generally accepted unwritten law' in the context of the unwritten standard of care.[278]

The UNGP addresses both states and corporations. States are expected to actively protect human rights against adverse actions from corporations within their territory. Corporations, on the other hand, are required to respect human rights and "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[279] RDS argued that the main responsibility for the protection of human rights therefore was attributed to the states, as they possess law-making capacity, and that corporations were merely required to adhere to the actions taken by states in these matters.[280] The court dismissed this argument, stating that corporations' responsibility to respect human rights "is a global standard of expected conduct" and that "[i]t exists independently of States' abilities […] to fulfil their own human rights obligations…"[281] Furthermore, the court deemed it not enough for corporations to simply adhere to the measures taken by states, and that corporations had an individual, non-optional and active responsibility to respect human rights. The human rights to be respected according to the UNGP, are the same rights found in other international treaties, such as the ICCPR and the ECHR. The court, while not stating it outright, had therefore found that further contributions to CO2 emissions by RDS could violate its unwritten standard of care, as climate change threatens Dutch residents human rights.[282]

### 5.1.3 The extent of the reduction obligation

Having established RDS's potential violation of the unwritten standard of care, the court turned towards formulating the required emissions reductions RDS needed to undertake, i.e., its reduction obligation, in order to avoid continued violation of the unwritten standard. The extent of the reduction obligation was deemed dependent on several factors, three of which will be discussed below: The Paris Agreement, RDS's liability as the parent company of the Shell group, and the required contributions of RDS and its competitors to 'solve' climate change.[283]

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[277] *Milieudefensie* (n 7) para. 4.4.11.
[278] *Ibid,* para. 4.4.12.
[279] UNGP (n 20) principle 1, 11.
[280] *Milieudefensie* (n 7) para. 4.4.12.
[281] *Ibid*, para. 4.4.15.
[282] See *Ibid,* paras. 4.4 (5.), 4.5.4.
[283] These aspects were selected due to both being the key factors in the matter and being themes previously examined by the thesis. The aspects that were set aside regarded mainly emissions trading, weighing CO2 emissions against the energy demand and possible reduction pathways.

***The Paris Agreement***

As mentioned, Milieudefensie et al. argued that the reduction obligation of RDS should be in accordance with the Paris Agreement.[284] The court, when addressing this claim, found that although the treaty does not legally bind corporations, including RDS, nor address them specifically, the signatories have, in the decision to adopt the treaty, highlighted the need for efforts to be taken by 'non-party stakeholders'. This 'need' has at later instances been reiterated by the COP, which has, according to the court, firmly established that there is a need for corporations to reduce their CO2 emissions in accordance with the Paris Agreement, regardless of them being bound by the treaty or not.[285] The court continued by stating that "the non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard…" in the pursuit of combating climate change, which factored into the courts considerations regarding RDS's reduction obligation.[286] The goals of the Paris Agreement has, as per the court's interpretation, assisted in creating the international consensus on the need for global net zero CO2 emissions being reached by 2050, an objective RDS is expected to work towards.[287] Following a discussion on possible pathways to reach global net zero emissions by 2050, the court pointed to the findings of the IPCC report of 2018.[288] The report suggests a net 45% reduction of CO2 emissions by 2030 compared to 2010 levels, which, according to the court, is "the best possible chance worldwide to prevent the most serious consequences of dangerous climate change."[289] After adjusting the base year for the reduction to 2019 from 2010, the court concluded that RDS's CO2 emissions must by 2030 be 45% lower than those of 2019.[290]

***Parent company liability***

The question also arose regarding RDS's role as the parent company of the Shell group, and whether the reduction obligation extended throughout the entirety of the corporate group. Milieudefensie et al. had claimed that RDS and its subsidiaries should be required to reduce its emissions.[291] The court therefore examined the many distinct aspects of the parent company liability issue. One connection the court made was that between the UNGP and parent company responsibility. The UNGP require companies to "seek to prevent and mitigate adverse human rights impact that are directly linked to […] their business relationships". Here, 'business relationships' should be understood as entities within its corporate group, among others.[292] The court had by this point already established that RDS sets the corporate

[284] *Milieudefensie* (n 7) para 3.1.1.
[285] *Ibid*, paras. 2.4.7-2.4.8, 4.4.26. See also section 4.1.2 above.
[286] *Ibid,* para. 4.4.27.
[287] *Ibid,* paras. 4.4.34, 4.4.36.
[288] *IPCC Special Report* (n 197).
[289] *Milieudefensie* (n 7) para. 4.4.29.
[290] *Ibid,* paras. 4.4.38-4.4.39.
[291] See note 252.
[292] *Milieudefensie* (n 7) paras. 4.4.17-4.4.18. The term 'business relationships' also contains business partners and end-users, but, due to spatial limitations, will not be examined here.

policy for the Shell group, and that its subsidiaries are required to execute and comply with the policy.[293] It had also found the Shell group to be responsible for significant CO2 emissions, exceeding the emissions of many states,[294] and that it undeniably contributes to global warming.[295] In the light of these factors, the court concluded that the influence RDS asserted over the Shell group meant the RDS's reduction obligation, as established above, extended to the entire Shell group.[296]

***Contributions by corporations***

Before reaching its conclusion, the court tackled a few points of contention held by RDS. Firstly, RDS claimed that any reduction obligation imposed on it will be rendered futile, in reducing the overall CO2 emissions globally, as another corporation would just take over RDS's market share, and thereby its emissions.[297] The court quickly dismissed this argument, stating that "each reduction of [GHG] emissions has a positive effect on countering dangerous climate change". It continued by acknowledging that RDS obviously cannot solve climate change alone, but that it nevertheless "does not absolve RDS of its individual partial responsibilities to do its part".[298] Furthermore, the court also found the 'substitution'-argument held by RDS to be factually incorrect: The Paris Agreement and its targets has forced the entire fossil fuel industry to begin skewing away from oil and gas, and instead pursuing other sustainable methods to produce energy,[299] meaning that the Shell group's emissions would not necessarily be replaced by a competitors emissions. The court also pointed to research on the area showing that production limitations have an actual effect on the reduction of emissions.[300]

Secondly, RDS argued that states and society are primarily responsible for the transition towards more sustainable alternatives, meaning that corporations cannot act until governments have established the framework for such a transition. The court disagreed, stating that RDS nevertheless had an individual responsibility for its emissions and that all corporations must work towards achieving the goals of the Paris Agreement. It also added that "RDS must do more than monitoring developments in society and complying with […] regulations".[301]

Thirdly, the reduction obligation placed upon the Shell group will, according to RDS, disrupt the fossil fuel market and create unfair competitive limitations on RDS. The court agreed with that the required reductions would have consequences

[293] *Milieudefensie* (n 7), para. 4.4.4.
[294] See section 5.1.1.
[295] *Milieudefensie* (n 7) para. 4.4.5.
[296] *Ibid,* paras. 4.4.34, 4.4.55.
[297] While RDS's line of argumentation is not exactly the same as those mentioned under section 3.3.2, it does nevertheless bring the 'death by a thousand cuts'-defence to mind.
[298] *Milieudefensie* (n 7) para. 4.4.49.
[299] See section 4.1.2.
[300] *Milieudefensie* (n 7) para. 4.4.50.
[301] *Ibid,* para. 4.4.51-4.4.52.

for the Shell group and likely affecting its economic growth, but held that "private companies […] may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions…" and that other companies around the world will eventually have to make the same contributions.[302]

***Conclusion***

In the end, RDS was imposed with an obligation to reduce the Shell group's CO2 emissions by 45% compared to 2019 levels, by adjusting its corporate policy to meet these targets.[303] The court declared the order provisionally enforceable, meaning that RDS was required to immediately comply with its obligation, and to continue complying with it up until an eventual successful appeal in a court of higher instance.[304]

### 5.1.4 Aftermath

The *Milieudefensie* ruling was instantly met with excitement by environmentalists, claiming it to be a monumental victory for climate and humanity. Many admired the court for its progressive thinking and for taking its responsibility and the first step in curbing global warming.[305] Once the initial celebrations had begun to diminish, legal scholars began reviewing the findings of the case in more depth. While some scholars were hopeful and inspired, other scholars began scrutinizing the decision, questioning the issues they could find. The main shortcoming of the ruling, as discussed by these scholars, was the court overstepping its boundaries as a judiciary body. Scholars have argued, and as phrased by Mayer, that the court "engages in an apparent law-making exercise",[306] and thereby challenging the separation of power in the Dutch government.[307] RDS had put forward the same argument, but, as mentioned above, the court proved to be unwilling to consider this objection and dismissed it.[308] An example of the court overstepping its boundaries, as held by Mayer, is the contents of the unwritten standard of care being based on political objectives rather than actual behaviour. The court effectively

[302] *Milieudefensie* (n 7) para. 4.4.53.
[303] *Ibid,* para. 4.4.55.
[304] *Ibid,* para. 4.5.7.
[305] See Tiffany Challe, 'Guest Commentary: An Assessment of the Hague District Court's Decision in Milieudefensie et al. v. Royal Dutch Shell' (*Climate Law Blog,* 28 May 2021) <https://blogs.law.columbia.edu/climatechange/2021/05/28/guest-commentary-an-assessment-of-the-hague-district-courts-decision-in-milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 5 May 2022; Isabelle Gerretsen, 'Shell ordered to slash emissions 45% by 2030 in historic ruling' (*Climate Home News*, 26 May 2021) <https://www.climatechangenews.com/2021/05/26/shell-ordered-slash-emissions-45-2030-historic-court-ruling/> accessed 5 May 2022; and Friends of the Earth, 'Historic victory: judge forces Shell to drastically reduce CO2 emissions (*Friends of the Earth Europe,* 26 May 2022) <https://friendsoftheearth.eu/press-release/historic-victory-judge-forces-shell-to-drastically-reduce-co2-emissions/> accessed 5 May 2022.
[306] Mayer (n 8).
[307] See Spijkers (n 25) p. 252-254.
[308] See section 5.1.1.

bridges the gap between political and environmental ambition, and actual law by only examining what the world, including corporations, should be doing instead of what corporations are actually doing. Mayer argues that a balance between objectives and actual actions should have been sought by the court, which would bring more legitimacy to its reasoning.[309] This line of defence is not new to climate litigation, and was also utilized by the Dutch government in *Urgenda*.[310] However, with the difference between *Urgenda* and *Milieudefensie* being that the court in *Urgenda* imposed a reduction obligation on its state, and the court in *Milieudefensie* 'only' imposing it on a corporation, it is possible that the 'law-making' of the court in *Milieudefensie* will not be subject to the same controversy. In fact, the Dutch government has confirmed that, although the government should determine the climate policy, the Hague District Court was correct in assessing the claims of Milieudefensie et al.[311]

In March 2022, RDS appealed the decision.[312] However, as a result of the court's order being provisionally enforceable, RDS had already in June the previous year announced that it had begun speeding up its GHG emission reductions throughout the Shell group.[313] Later in November the same year, RDS decided to move its headquarters to the U.K., thereby abandoning 'Royal Dutch' and settling for 'Shell plc.'[314] While this move will have no impact on the *Milieudefensie* ruling or RDS's obligations under it, it could mean that any future claims against RDS will be heard in the U.K. This could potentially prove beneficial for RDS as the Dutch courts, as has been seen in *Urgenda* and *Milieudefensie*, tend to produce environmentally favourable decisions more than courts in other jurisdictions.[315] Regardless of whether the decision stands or the appeal is allowed, the *Milieudefensie* ruling has already begun to create ripples throughout the field of climate change. The *Milieudefensie* case has not gone unnoticed by corporations within different emitting sectors, and to them, the ruling has been a further confirmation of the increasing pressure on them to reduce their emissions, and their subsequent need to act.[316] Moreover, scholars agree on that the success of Milieudefensie et al. will likely inspire and embolden other environmental legal activists to pursue similar

[309] Mayer (n 8).
[310] *Urgenda III* (n 22) paras. 8.1-8.3.5.
[311] See Spijkers (n 25) p. 254.
[312] Shadia Nasralla and Kirstin Ridley, 'Shell filed appeal against landmark Dutch climate ruling' *Reuters* (29 March 2022) <https://www.reuters.com/business/sustainable-business/shell-filed-appeal-against-landmark-dutch-climate-ruling-2022-03-29> accessed 3 May 2022.
[313] Ben Chapman, 'Shell to speed up emissions cuts after landmark Dutch court ruling' *The Independent* (10 June 2021) <https://www.independent.co.uk/news/business/shell-emissions-cut-climate-crisis-b1862690.html> accessed 3 May 2022.
[314] 'RDS' will be used for the remainder of the thesis, see note 246.
[315] FT Reporters, 'Shell verdict sets scene for more corporate climate cases' *Financial Times* (28 May 2021) <http://www.ft.com/content/f18269ee-c9d8-45c4-bbee-28561b065e6b> accessed 25 April 2022.
[316] FT Reporters (n 315).

claims all over the world for years to come.[317] Peel and Markey-Towler have concluded that there are a number of important strategic lessons other potential claimants should draw from *Milieudefensie*. These lessons include that claimants should be going after well-known emitters, connecting legal arguments to climate science, and keep "making innovative legal arguments".[318] Milieudefensie, the NGO itself, has also issued a guide to help other activists succeed with private climate litigation actions,[319] and has threatened other Dutch corporations with climate litigation actions if they do not adapt a plan to reduce their GHG emissions.[320] While environmentalists would naturally prefer the *Milieudefensie* ruling to stand in a court of higher instance, the case, and Milieudefensie et al., has nevertheless proven that private climate litigation is not a fruitless labour anymore.

## 5.2 The future of private climate litigation

The influx of international law into private climate litigation has contributed to creating a wide array of legal avenues for claimants to pursue. The Paris Agreement has helped explain and establish the stakes, objectives and measures needed, for the public and courts alike. Human rights-instruments have incorporated environmental values, and treaties such as the UNGP have begun attributing the protection of these rights to corporations. This has created a solid legal basis for claimants to build their case around, as can be witnessed in *Milieudefensie*. However, while the success in the aforementioned case could be interpreted as international law being the go-to solution for all future private climate litigation claims, there is also the matter of whether the claim's success can replicated elsewhere.[321] It is clear that international law was an essential factor in the court's reasoning, but one could ponder whether the same ruling could have been reached were it not for the Dutch unwritten standard of care? The answer to that question is likely no. Despite international law being a key factor for the court's conclusions, it was only ever interpreted in the light of the unwritten standard. Not one of the international treaties referenced in the *Milieudefensie* ruling impose obligations on corporations that are directly binding. The unwritten standard of care in Dutch law is the knot which ties all the considerations, responsibilities, and ambitions of international law together into a direct reduction obligation for corporations. This means that it becomes difficult to 'export' the Hague District Court's ruling to other jurisdictions where there is no

[317] See Setzer and Higham (n 6) p. 31.
[318] Peel and Markey-Towler (n 39) p. 1487.
[319] Rosie Frost, 'This climate group has published a guide on how to successfully sue Shell' *Euronews* (10 November 2021) <https://www.euronews.com/green/2021/11/10/meet-the-dutch-climate-group-who-want-to-show-you-how-they-sued-shell> accessed 23 April 2022.
[320] Cara Räker, 'Climate action or you're going to court: Milieudefensie tells Dutch companies' *Dutchreview* (13 January 2022) <https://dutchreview.com/news/milieudefensie-pressures-dutch-companies-to-take-concrete-climate-action/> accessed 7 May 2022.
[321] See Setzer and Higham (n 6) p. 31.

an unwritten standard of care or a similar duty.[322] As an example, Canadian and Australian scholars have already asserted that it is unlikely that the *Milieudefensie* ruling will see any influence on their respective courts.[323] In Sweden, a court held in a climate litigation case in 2017 that in order for the 'duty of care' under Swedish tort law to be applicable, damage must have occurred.[324] It would therefore not be possible to use the Swedish 'duty of care' to protect against future impacts of climate change, as the Dutch court did in *Milieudefensie*.

However, there are a few countries where there exists a domestic 'duty of care' reminiscent of the stemming from Dutch tort law. In Belgium, a district court held in 2021 that the Belgian government had violated its 'duty of care' against its citizens by failing to take sufficient measures for preventing harm to them by climate change. Similar to *Urgenda* and *Milieudefensie*, the Belgian court also attributed the protection of human rights under the ECHR to the 'duty of care'.[325] Moreover, the French Commercial Code imposes a 'duty of vigilance' on French corporations, requiring them to produce a corporate strategy that mitigates the risks that their activities might pose to the environment and human rights. In *Notre Affaire à Tous v. Total,* the claimants argue that this duty of vigilance requires the defendant to ensure that its emissions are reduced to align with the objectives set by the Paris Agreement.[326] Should the claimants prove successful in *Notre Affaire à Tous v. Total*, France, Belgium, and the Netherlands will likely have established themselves as the go-to jurisdictions for private climate litigation. The 'duty of care', or variations of it, found in their legal orders allows for creating corporate obligations from international treaties to which the corporations are not bound by, thereby ensuring that environmental values are followed by private entities as well. However, beyond these countries, where the 'duty of care'-approach would prove futile, corporations might still be out of reach of international law. '

Aside from potential 'duty of care'-claims, there are a few more takeaways from *Milieudefensie* that could give a glimpse into the future of private climate litigation. A less highlighted aspect of the verdict was the court's statements on parent

[322] See Maxine Joselow, 'Court Orders Shell to Slash Emissions in Historic Ruling' *E&E News* (27 May 2021) <https://www.scientificamerican.com/article/court-orders-shell-to-slash-emissions-in-historic-ruling/> accessed 4 April 2022.
[323] See André Durocher et al., 'Milieudefensie v. Royal Dutch Shell: What Corporate Canada Needs to Know About Climate Lawsuits (*Fasken,* 28 July 2021) <https://www.fasken.com/en/knowledge/2021/07/28-shell-v-milieudefensie-what-corporate-canada-needs-to-know-about-climate-lawsuits> accessed 3 May 2022; and Jaqueline Peel, Ben Neville, and Rebekkah Markey-Towler, 'Four seismic climate wins show Big Oil, Gas and Coal are running out of places to hide' (*The Conversation,* 30 May 2021) <https://theconversation.com/four-seismic-climate-wins-show-big-oil-gas-and-coal-are-running-out-of-places-to-hide-161741> accessed 3 May 2022.
[324] *PUSH Sweden, Nature and Youth Sweden and Others v. Government of Sweden* [2017] T 11594-16 Stockholm District Court.
[325] *Klimaatzaak* (n 165). See also section 3.2.3.
[326] *Notre Affaire à Tous v. Total* (n 21). See also section 3.2.3.

company liability. The court held, as mentioned in section 5.1.3, that RDS, being the parent company, asserted decisive influence over the Shell group's climate policy, and were therefore required to reduce the CO2 emissions throughout the entire Shell group by adjusting its corporate policy.[327] Similar issues concerning parent company liability have also been considered by the U.K. Supreme Court recently in matters of oil spill and toxic discharge, with a similar outcome to that of *Milieudefensie*.[328] Overall, the trend seems to be a continued increase of parent company liability claims. Progress within this area could be vital for individuals affected by the activities of subsidiaries in jurisdictions with no opportunities for legal redress.[329] Moreover, leading up to 2030, we will likely see an increase in environmental regulation as states and corporations scramble to meet their NDCs or corporate targets. The UN Human Rights Council's recent resolution on sustainable environment being a human right[330] will likely be taken into consideration alongside the ECHR and other fundamental rights instruments in future climate litigation cases, including the *Milieudefensie* appeal. The European Commission has also recently proposed a directive with the result of EU corporations, and foreign corporations acting in the EU market, being required to undertake environmental rights due diligence for their activities.[331] While it is impossible to gauge the state of global climate change regulation in five- or ten-years' time, it will likely be more stringent than the regulation of today. This could mean that future claimants might see easier and more consistent success in private climate litigation cases. It is still too early to tell if *Milieudefensie* marks the start of a third wave of private climate litigation, but it is certain that the future within the field will at the very least be a bit more different than it was before the ruling.

[327] *Milieudefensie* (n 7) paras. 4.4.4 - 4.4.5, 4.4.23, 4.4.55.
[328] *Lungowe v. Vedanta Resources plc* [2019] UKSC 20 and *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3.
[329] See Wessen Jazrawi, 'Now trending: parent company liability following Milieudefensie' (*Hausfield*, 25 June 2021) <https://www.hausfeld.com/what-we-think/perspectives-blogs/now-trending-parent-company-liability-following-milieudefensie> accessed 8 May 2022.
[330] See note 238 above.
[331] See Karen Jacobs, 'What next for climate change litigation after Shell carbon dioxide emissions ruling?' (*Stewarts,* 4 January 2022) <https://www.lexology.com/library/detail.aspx?g=ecab95bc-9e10-4f86-aced-82afad698761> accessed 8 May 2022.

# 6 Conclusion

With the *Milieudefensie* ruling, private climate litigation has seen its first major success. It is still too soon to make any definitive statements regarding the legacy of the case, and one should not necessarily expect other claimants to achieve the same results in other parts of the world. Nevertheless, the ruling does mark a milestone in the legal and environmental struggle between individuals and corporations, and has established private climate litigation as a possible tool for enforcing environmental values on entities that has otherwise escaped such responsibility and liability.

It remains difficult to assess the history and current state of private climate litigation without also examining public climate litigation. Private climate litigation has yet to establish itself as a type of litigation completely separate from public climate litigation, and still follows in its footsteps. In most cases, public climate litigants have been the ones pushing the envelope with innovate legal reasoning and persistence, whereas private climate litigants have mostly identified the strategies that proved successful in public cases, i.e., 'duty of care' and human rights-based argumentation, and adapted those arguments to be applicable to private entities. It will be interesting to watch whether private climate litigation at some point branches of into a path of its own, or if it continues to seek inspiration from public climate litigation.

As regards the research question of domestic law and the obstacles it creates for private climate litigants, most of the original hurdles have actually been overcome. These obstacles have been surmounted partly by developments in climate change science and environmental law, but also through 'trial and error' by earlier claimants. Climate litigation has by this point become more predictable, in the sense that there is less uncertainty as to which claims will be allowed by courts. Legal standing has proven to be a minor issue in several recent climate litigation cases, such as *Milieudefensie* and *Neubauer et al.*, which could indicate that environmentalists have a greater access to courts than ever before. It is however impossible to assess the deterrent effect legal standing barriers might have for claimants' willingness to instigate actions. As for finding legal basis in national law, there are no domestic laws that allows for claims against corporations on the sole basis of them emitting. Constitutional rights can, on the other hand, be utilized similarly to international human rights, as can be seen in *Neubauer et al.* and the ongoing *Notre Affaire à Tous v. Total.* Moreover, the 'duty of care', that can be found in several domestic legal orders, has proven to be the key to connecting environmental obligations under international law to corporations, as could be seen in *Milieudefensie*. It is however unclear how well courts outside France, Belgium, and the Netherlands, will react to this type of argumentation. Finally, as concerns

the issues of causality often raised by defendants, advances in climate change science have allowed for clear evidence as to the impact of GHG emissions. This has made it possible to attribute climate change related damage to corporations, and thereby establishing their individual responsibility to curb climate change.

The introduction of international law into private climate litigation became a turning point in its progress. In 2015, the adoption of the Paris Agreement created a global consensus on what needs to be done to protect against dangerous climate change, and set the fossil fuel industry on a trajectory towards more sustainable energy solutions. While the Paris Agreement itself does not impose legal obligations on corporations, it has nevertheless established the importance of all entities contributing to the reduction of GHG emissions. The evolution of human rights-treaties, mainly their adoption of environmental values, has also played a key role in both private and public climate litigation. Treaties such as the UNGP has further helped connect the gravity of human rights violations to the actions of corporations. Yet international law does not establish any direct obligations for private entities, meaning that it is still dependant on domestic laws, such as the aforementioned 'duty of care', to impose its values onto corporations. In that sense, the current state of international environmental law is not the sole solution to achieving success in private climate litigation. International law could perhaps evolve to accommodate and deal with the significant GHG emissions caused by corporations. In legal doctrine, the idea of direct obligations for corporations under international law has been discussed for a long time.[332] While it is controversial to extend international law to private entities, some corporations, as has been established by the thesis, are responsible for greater GHG emissions than most countries, but not liable for its actions in the same way as states are. Direct obligations, possibly existing in a distant and uncertain future, could potentially bypass the need for domestic law to serve as a bridge between international law and binding obligations for corporations. As the adverse effects of climate change continue to increase, one could imagine states becoming more willing to adopt more drastic measures, which could lead into such direct obligations for corporations.

Returning to the purpose of the thesis, it is difficult to assess whether the current state of private climate litigation is a viable tool for combating global warming, or if there is a need for a novel approach. While *Milieudefensie* is undoubtedly a landmark case within the field, its future impact is not equally clear. One of the main problems with the ruling is that there seems to be little possibility of replicating the findings by the Dutch court, as concerns the 'standard of care', outside of the Netherlands. In that sense, *Milieudefensie* may perhaps not be able to

[332] See Andrés López Latorre, 'In Defence of Direct Obligations for Businesses under International Human Rights Law' (2020) 5 Business and Human Rights Journal 56; and Carlos Vázquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) Georgetown Law Faculty Publications and Other Works 980.

provide to other claimants a line of legal argumentation that is guaranteed to work in all cases. One could also argue that the court overstepped its boundaries or that it created obligations where there was no legal basis to do so. For these reasons, the *Milieudefensie* ruling might not be able to create any jurisprudential and legal value for future private climate litigation.

*Milieudefensie* is, however, much more than a simple Dutch tort law case. In a sense, it is the culmination of the entire progress of domestic law, international law, and climate related science up to this point. The hurdles previous claimants have surmounted, and the arguments that have been invented by litigants, can be viewed in the *Milieudefensie* ruling, and especially in the court's willingness to extensively interpret domestic law and incorporate international environmental values into it. The court could just as easily have chosen to disregard from the Paris Agreement and the human rights-treaties because they were not binding on RDS. The success of the case would therefore indicate that private climate litigation is heading in the right direction, and that courts are proving more willing to actually hold corporations liable for climate change. One could imagine that other courts will look to the ruling, and be influenced by the Dutch court taking its responsibility for combating climate change. In a similar sense, climate litigants will undoubtedly be motivated and inspired by *Milieudefensie* for the foreseeable future. Despite its issues, I consider *Milieudefensie* to be the natural next step for private climate litigation, and therefore in no way an anomaly. In fact, to me, the outcome of the case is, more than anything, well-deserved for all private climate litigants who have pursued this success through numerous of failed claims.

While the actual legacy of the *Milieudefensie* decision remains to be seen, the actions of states, private entities, courts, and individuals will determine what impact the ruling will have for private climate litigation. The inevitable review of the *Milieudefensie* ruling by higher Dutch courts, and courts in other jurisdictions throughout the world, will be the true indication of whether the current human rights/tort law approach is a suitable method, and if it has the potential to bear fruit elsewhere. However, if courts choses to dismiss the findings in *Milieudefensie,* there could be a need for a new approach to private climate litigation, which in turn could spur change in another direction, possibly towards direct obligations under international law. Regardless of how well the *Milieudefensie* ruling stands the test of time, one can be sure that climate litigants will continue to innovate and push the limits of private climate litigation.

In the end, we are living in a period where the survival of humanity is likely to be decided, and while judges and litigants can't decide its fate alone, they have proven themselves willing to try. However, fossil fuel corporations need to begin the transition towards sustainable energy regardless of there being a court ordering them to do so or not. Perhaps will the *Milieudefensie* ruling serve as a warning to those neglecting the transition. Ironically yet expectedly, in the days leading up to me concluding my work on this thesis, a new report on the increasing impacts of global warming surfaced. The report establishes, among other things, that GHG concentrations in the atmosphere are at an all-time high.[333] In response to this report, the current UN Secretary-General António Guterres fittingly stated that:

> "We must end fossil fuel pollution and accelerate the renewable energy transition, before we incinerate our only home. Time is running out."[334]

[333] World Meteorological Organization, *State of the Global Climate 2021* (WMO, 2021).
[334] UN, 'Transcript – António Guterres (Secretary-General) Remarks at Press Conference on WMO State of the Global Climate 2021 Report' (*UN Web TV,* 18 May 2022) <https://media.un.org/en/asset/k1q/k1qn00cy8a> accessed 20 May 2022.

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