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| **District Court of The Hague** | | |
| Case number: Session: | C/09/571932 2019/379 15 December 2020 | **NOTES ON ORAL ARGUMENTS 6**  **Merits of the claim – part 1** |
|  |  | in the matter of   1. **Vereniging Milieudefensie** both on its own behalf, and in its capacity of representative ad litem and representative of the co-claimants who are listed on **Annex A**, which annex is attached to the summons and forms part thereof, having its registered office in Amsterdam, the Netherlands; 2. **Stichting Greenpeace Nederland**,   having its registered office in Amsterdam, the Netherlands;   1. **Landelijke Vereniging tot Behoud van de Waddenzee**, having its registered office in Harlingen, the Netherlands; 2. **Stichting ter bevordering van de Fossielvrij-beweging**, having its registered office in Amsterdam, the Netherlands; 3. **Stichting Both ENDS**, having its registered office in Amsterdam, the Netherlands; 4. **Jongeren Milieu Actief**, having its registered office in Amsterdam, the Netherlands; 5. **Stichting ActionAid**, having its registered office in Amsterdam, the Netherlands   Claimants Hereinafter also called: “Milieudefensie et al.” |
|  |  | Counsel:  Mr. R.H.J. Cox  Mr. D.M.J. Dexters  Mr. A.J.M. van Diem  Mr. S.J. Keuls |
| Versus |
| **Royal Dutch Shell plc**  Having its registered office in the Hague, the Netherlands  Defendant  Counsel: Mr. D. Horeman  Mr. J. de Bie Leuveling Tjeenk  Mr. N.H. van den Biggelaar |

Your Honours,

**Introduction**

1. Today Milieudefensie et al. will explain in further detail why it believes that a company which is in RDS’ exceptional position, is subject to a special duty of care in relation to the global climate problem and what actions may be demanded of RDS in this respect.
2. During the preceding session days Milieudefensie et al. already set out that RDS has control over the scope of emissions of the Shell Group and can therefore be held accountable for these emissions; that to date RDS has only obstructed the global climate response through its lobby activities and has great political influence; that it is widely acknowledged globally that the help of non-state actors like RDS is necessary to be able to achieve the Paris goal; and that the coming 10 years are crucial to be able to prevent dangerous climate change.
3. In addition, it was explained that the permits which the subsidiaries of RDS possess and the worldwide regulation by governments – or the lack thereof – do not stand in the way of awarding the claim. It was then explained that – contrary to what RDS asserts – mitigation of dangerous climate change is in fact synergetic with other relevant domestic and international interests, including the interests of universal access to energy and the sustainable development goals of the United Nations in a broad sense. Public international law, human rights law and international guidelines such as the UN Guiding Principles on Business and Human Rights all point in the same direction. A big oil and gas company like RDS may be expected and required to act in line with the Paris goal. The District Court need not show reserve in awarding the claim.
4. During the next hour of the oral arguments it will be explained that on the basis of the societal duty of care – fleshed out on the basis of the Kelderluik criteria, human rights law and soft law – RDS is subject to a duty of care to contribute to preventing dangerous climate change. Mr Cox will then explain how the universally supported and accepted safety standard on the basis of the best available and widely acknowledged scientific findings is being concretely fleshed out, how this relates to the claim and why it can be imposed on RDS.

**Fleshing out of the societal duty of care**

1. The global consensus on what needs to take place to prevent climate change which poses danger to humans and the environment, has legal significance for RDS. Under Dutch law RDS has a societal duty of care to contribute to the prevention of dangerous climate change. In the framework of the assessment of the societal duty of care referred to in Article 6:162 of the Dutch Civil Code, when reviewing specific conduct in the given circumstances of the case at hand, it must be determined what in that concrete situation is socially acceptable conduct.
2. As has been explained in detail in the summons, Milieudefensie et al. believes that for the assessment of the societal duty of care to which RDS is subject in this case, use can and must be made of, inter alia, the criteria set out in the Kelderluik case.
3. It is assumed in the literature and case law that the Kelderluik criteria not only apply in (simple) situations of accident or hazardous negligence, but also in other situations. It is relevant in this respect that the Kelderluik criteria have a legal-economic background and align with basic and ‘common sense’ notions regarding how to deal with risks.[[1]](#footnote-1) By weighing – in accordance with the Kelderluik criteria –the costs of care against the damage which can be prevented with it, the optimal care level can be achieved.[[2]](#footnote-2)
4. Against this background it is worth pointing out that similar criteria have also been accepted in foreign legal systems, such as the ‘Learned Hand formula’ in Anglo-American legal systems. The Principles of European Tort Law and the Oslo Principles on Global Climate Obligations have a similar assessment framework as well. In addition, the Kelderluik criteria have important similarities with the perspectives applied by the European Court of Human Rights in the assessment of obligations in situations involving environmental danger.[[3]](#footnote-3) According to Milieudefensie et al., the Kelderluik criteria are therefore highly suitable for application in this case.
5. The suitability of the hazardous negligence doctrine and the Kelderluik criteria for situations of dangerous climate change furthermore appears from the judgment of the District Court in the Urgenda case.[[4]](#footnote-4) If in a climate case against the government the Kelderluik criteria can offer good leads for the assessment of the societal duty of care, this applies all the more to this case, which concerns the actions of a commercial enterprise in relation to citizens. In the case law the Kelderluik criteria particularly apply in disputes between commercial enterprises and private parties.
6. RDS’ defence that the Kelderluik criteria are not suitable for application in a complex case such as this one, therefore cannot succeed. The Kelderluik criteria are good tools for the assessment of the facts and circumstances which are relevant in this case. What is more, the reference framework offers scope for considering all circumstances of the case and, for example, formulating additional criteria therefor.   
     
   This also appears clearly from the Urgenda judgment at first instance, where the District Court geared the Kelderluik criteria to the specific danger of climate change and also supplemented them with a sixth criterion relating to the freedom to make policy which the state has in the execution of its public task.[[5]](#footnote-5)
7. In addition, the review does not stop at the mere application of the Kelderluik criteria. Other circumstances of the case can also be weighed. This appears from, inter alia, the notes on oral arguments 5 ‘the double challenge’, as presented during day 2 of the session, which also explained other national and international interests.
8. As a final note, Milieudefensie et al. believes that, in addition to and in conjunction with the Kelderluik criteria, the societal duty of care must be realised on the basis of the applicable human rights law and soft law.
9. What is relevant in this respect is that in the Urgenda case all three judicial instances came to the same conclusion and that they made use of the same sources for that finding in law: Case law of the European Court of Human Rights, international human rights, international climate regulations, international soft law and the best available climate science. The District Court by means of a consequential effect (whereby a rule of law specifically intended for one area of application may be used in another area) in domestic law via the societal duty of care. The Court of Appeal and the Netherlands Supreme Court via a comparable common-ground method, entailing that for the interpretation and the purport and scope of human rights in the European Convention on Human Rights, there must be a review of the aforementioned sources and alignment must be sought with widely shared views in an international context.[[6]](#footnote-6)
10. Hereafter it will be explained in further detail what conclusions follow from the application of the Kelderluik criteria, human rights law and soft law to this case.

**Fleshing out of Kelderluik criteria**

1. Before presenting the overview I will first briefly discuss the Kelderluik criteria as these were formulated by the District Court in the Urgenda case:[[7]](#footnote-7)
   1. the nature and the scope of the damage caused by climate change;
   2. the knowledge and foreseeability of this damage;
   3. the likelihood that dangerous climate change will manifest itself;
   4. the nature of the conduct (or the omissions) of RDS; and
   5. the inconvenience of the precautionary measures to be taken;

These criteria should be applied with a view to the state of the art science, the available (technical) possibilities to take safety measures and the cost-benefit ratio of the safety measures to be taken.

1. Milieudefensie et al. will now first briefly discuss criteria (i) and (iii), with regard to the nature and scope of the damage as a result of climate change and the chance that dangerous climate change will manifest itself.

**(i) Nature and scope of the damage and (iii) the chance that dangerous climate change will manifest itself**

1. The nature and scope of the damage has already been explained in detail in the summons and during the first two days of these multi-day oral arguments.
2. The UN Special Rapporteur on Human Rights and the Environment summarises it nicely (quote):[[8]](#footnote-8)  
     
   *“The most pressing environmental risk is climate change, which not only exacerbates air pollution and biodiversity loss, but multiplies a broad range of risks, detailed below, leading to negative impacts on billions of people. A growing number of States, including Canada, France and the United Kingdom of Great Britain and Northern Ireland, have declared a global climate emergency.”*and *“Climate change is already, at warming of 1°C, having a negative impact on billions of people. According to the Intergovernmental Panel on Climate Change, “warming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C.”22 As temperatures increase, so do the negative impacts. At 2°C, the Intergovernmental Panel on Climate Change forecasts that droughts and heat waves will be more frequent and twice as long, 100 million more people will face water insecurity, and the risks of an ice-free Arctic and glacier-free mountains will rise substantially. It will be easier and less expensive to ensure adaptive capacity and resilience at 1.5°C compared to 2°C or higher.”*
3. In this case the basic principle can and must be that the nature and scope of the damage to the environment is global and of unparalleled seriousness. This cannot be emphasised often enough, but there cannot really be any discussion about this.
4. The far-reaching consequences of dangerous climate change for the Netherlands must not be underestimated. It would be a misconception to think that a wealthy country like the Netherlands will be easily able to withstand these consequences. As explained in Chapter VII.2.2 et seq. of the summons, and as emphasised in the statement of Milieudefensie et al. of 4 December 2020, excessive warming up of the climate can also pose a very serious threat to the Netherlands.
5. Action of non-state actors like RDS is necessary to reduce the chance of the above-described damage manifesting itself. Nor can we afford to wait any longer to take action. This has already been explained in detail in the summons, in the opening arguments and in the statement explaining the amendment of the claim of 6 November 2020.
6. There is broad consensus on the nature and scope of the damage, the chance that this will manifest itself, and also what must be done to limit these risks, both in the scientific arena and between countries worldwide. RDS cannot dispute this. A universally supported and accepted safety standard has been achieved by means of the UN Climate Convention and the Paris Climate Agreement, which functions as a lower limit for the minimum that must be done to prevent dangerous climate change. The District Court, the Court of Appeal and the Netherlands Supreme Court acknowledged the above in the Urgenda case and confirmed it in so many words.
7. For now, it can be concluded with regard to the Kelderluik criteria (i) and (iii), that the nature and scope of the damage is enormous and that the chance that dangerous climate change will manifest itself is real, if we do not pull out all the stops as quickly as possible to prevent this. The coming ten years are crucial in this respect. In the weighing of interests to be made with regard to the societal duty of care, this should carry a very great degree of – and in the opinion of Milieudefensie et al., decisive – weight.
8. Milieudefensie et al. will now go into the role which human rights should play in the weighing of interests to be made in the framework of the societal duty of care. This will be followed by a discussion of the remaining Kelderluik criteria.

**Dangerous climate change falls under the scope of human rights**

1. In addition to the Kelderluik criteria, Articles 2 and 8 of the European Convention on Human Rights and other internationally recognised human rights have normative significance for determining the scope of the duty of care borne by RDS.
2. RDS asserts in this respect that the scope of Articles 2 and 8 of the European Convention on Human Rights is not so broad that it encompasses an issue like climate change. The inaccuracy of this position is evident, as ensues from the judgment of the Netherlands Supreme Court in the Urgenda case.[[9]](#footnote-9) The Netherlands Supreme Court considered (quote):

*“5.7.9. Climate change threatens human rights, as ensues from the considerations in 5.6.2. above. This is also internationally recognised outside of the framework of the Council of Europe.”*

1. Via the ‘common ground’ method the Netherlands Supreme Court came to the conclusion that Articles 2 and 8 of the European Convention on Human Rights do indeed offer protection against climate change.[[10]](#footnote-10) The Netherlands Supreme Court made use of widely supported scientific understanding[[11]](#footnote-11) and derived inspiration from international regulations, recognised principles of law and other soft law*,* as an expression of widely supported (legal) views*.*[[12]](#footnote-12) Use is made in this respect of, inter alia, the UN Climate Convention and the Paris Agreement. The Netherlands Supreme Court thus examined whether there are sufficient objective grounds from which a concrete standard can be derived in the given case, which must be legally complied with.   
     
   The court’s examining of objective grounds which can be given the status of a concrete standard in the given case, is, according to the Netherlands Supreme Court, required to achieve effective legal protection within the meaning of Art. 13 of the European Convention on Human Rights.[[13]](#footnote-13)
2. The Netherlands Supreme Court refers for substantiation of the point to the opinion of Deputy Procurator General Langemeijer and Advocate General Wissink (quote):

*“2.79 From a human rights perspective, relevant is the fact that in recent years the link between climate change and human rights has been increasingly explicitly established at the international level. (…)*

*This does not, however, exclusively concern Articles 2 and 8 ECHR. An explicit reference to human rights can be found in the introduction of the aforementioned Paris Agreement (2015): “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.””*

1. It appears from the foregoing that RDS’ assertion that Articles 2 and 8 of the European Convention on Human Rights as such do not offer legal protection against dangerous climate change, cannot succeed.
2. In addition to Articles 2 and 8of the European Convention on Human Rights, dangerous climate change also falls under the scope of other universally acknowledged human rights. As explained, the Netherlands Supreme Court based its opinion that climate change falls within the scope of Articles 2 and 8 of the European Convention on Human Rights precisely on the conclusion that there is international consensus that human rights are threatened by climate change.
3. In the summons reference was already made in this respect to Resolution 10/4 of the UN Human Rights Council of 2009.[[14]](#footnote-14) This resolution states – with a reference to, inter alia, the Universal Declaration of Human Rights[[15]](#footnote-15), the International Covenant on Civil and Political Rights[[16]](#footnote-16) and the International Covenant on Economic, Social and Cultural Rights[[17]](#footnote-17) – that climate change is a worldwide threat to various human rights protected by the aforementioned treaties, including the right to life.
4. The UN Special Rapporteur on Human Rights and the Environment comes to the same conclusions (quote):

*“The Special Rapporteur concludes that a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being.”[[18]](#footnote-18)*

*“it is clear that the global climate crisis will worsen, with devastating implications for human rights, unless society changes direction.”[[19]](#footnote-19)*

*“Climate change is having a major impact on a wide range of human rights today, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture.”[[20]](#footnote-20)*

1. The Special Rapporteur then explains in his report in what international treaties and other legal sources the human rights mentioned in the above quote are laid down and how these are affected by dangerous climate change.[[21]](#footnote-21)
2. Just as much as dangerous climate change falls under the scope of Articles 2 and 8 of the European Convention on Human Rights, the foregoing shows that there are broad international consensus that other internationally recognised human rights are also affected by dangerous climate change and offer protection against such. As explained with the Kelderluik criteria (i) and (iii), worldwide the climate problem is a societal danger of unknown scope. The mere fact that at global level dangerous climate change categorically leads to human rights violations, is a further confirmation of the seriousness and scope of this problem. Inherent in this, is that when weighing the interests substantial weight must be attributed to these human rights.
3. I will now explain how the aforementioned human rights have a ‘consequential effect’ in the societal duty of care as referred to in Article 6:162 of the Dutch Civil Code.

**Horizontal effect of human rights**

1. There can be no doubt or discussion that the aforementioned human rights can be directly invoked against states in relation to climate change, a point reinforced by the judgment of the Netherlands Supreme Court in the Urgenda case. The only question remaining is in what degree a claim can be based on these human rights with regard to a private party like RDS.
2. In Dutch case law horizontal effect has been attributed to the articles of the European Convention on Human Rights on a wide scale, via open standards of private law such as the societal duty of care of Art. 6:162 of the Dutch Civil Code.[[22]](#footnote-22)
3. In the literature, in this context, as a further elaboration of this ‘horizontal effect’ a distinction is made between direct and indirect effect.
4. RDS takes the position that the European Convention on Human Rights does not directly apply to it, because the articles in the European Convention on Human Rights are directed at governments. In the case of indirect horizontal effect, RDS believes that all relevant interests weigh equally heavily and that consequently no special weight can be attributed to a human right to be considered, other than by direct horizontal effect.
5. In so far as RDS argues that human rights, in the consideration of the interests which must be made, never have a greater weight than the other interests that play a role, this does not align with the legislative history, the prevailing legal view according to the case law of the European Court of Human Rights and the Netherlands Supreme Court and the legal literature. It is generally assumed that, despite the theoretical divide between direct and indirect effect, it must be assessed per case in a nuanced manner in what degree fundamental rights have a consequential effect in societal relationships and how heavily they weigh. In the event of an indirect effect too, decisive significance can indeed be attributed to human rights interests.
6. In this framework reference is first of all made to the history of the making of the legislation. According to the government, in this respect a nuanced approach must be followed. In the words of the government commissioner (quote):

*“A reasonable interpretation must lead to the conclusion that a horizontal effect is permitted. Thereafter it will have to be determined from case to case and from group case to group case to what extent this horizontal effect must be attributed.”[[23]](#footnote-23)*

1. The theoretical divide between direct and indirect effect can also be characterised as a dogmatic ‘battle of labels’ and is less relevant for practice.[[24]](#footnote-24) Lindenbergh words this as follows (quote):

*“From a technical-legal perspective, one vision need not in practice lead to ‘a greater consequential effect’ than the other: direct effect can be viewed very restrictively, while indirect effect can be very substantial.* *In the meantime our law therefore has many examples of indirect effect in a wide range of forms and gradations.”[[25]](#footnote-25)*

1. The negligible practical importance of the distinction between direct and indirect horizontal effect also appears from case law in which courts, including the Netherlands Supreme Court, often take account of fundamental rights in their assessment when weighing the relevant mutual interests, without always dogmatically referring to this as a direct or indirect effect.[[26]](#footnote-26)
2. The conclusion must therefore be that the Dutch court heeded the wish of the drafters of the constitution to apply a ‘casuistic’ approach, by in a pragmatic manner involving fundamental rights as essential ‘legal interests’ in the opinion forming.[[27]](#footnote-27)
3. That, as RDS has argued, the European Court of Human Rights did not attribute direct effect to articles of the European Convention on Human Rights, cannot detract from the foregoing. It ensues from the source cited by RDS itself in this respect that the European Court of Human Rights leaves it up to the domestic courts – this District Court – to grant the rights contained in the European Convention on Human Rights a horizontal effect which is appropriate for the case.[[28]](#footnote-28) This also falls under the explicit responsibility which the court has as an agency of the state, to safeguard rights under the European Convention on Human Rights in private legal relationships and – as just indicated – to offer effective legal protection within the meaning of Art. 13 of the European Convention on Human Rights.[[29]](#footnote-29) In addition, the jurisprudence provides examples in which a significant weight is attributed to human rights.[[30]](#footnote-30)
4. This District Court can similarly grant international human rights a consequential effect within the weighing of interests pursuant to Article 6:162 of the Dutch Civil Code. The matter concerns an open legal standard with a strongly casuistic character, so that account can be taken of the global context and impact of this case.

**The human rights at issue have significant weight in this case**

1. Now that it has been explained that this District Court has the discretion and under constitutional law also the obligation to take a look in a pragmatic and casuistic manner at the influence of fundamental rights in the horizontal relationship, I will now explain why in this case it is also necessary to attribute significant weight to human rights, in addition to the circumstance that the nature and scope of the danger and the nature of the specific universal human rights which are affected by this – including the right to life – in the opinion of Milieudefensie et al. inherently carry significant weight.
2. The most important reason why attributing significant weight to the human rights at issue is justified, becomes clear when one looks at the reasons *why* our law actually has a horizontal effect of fundamental rights.
3. Individuals are increasingly being confronted with private law organisations which possess considerable power and which determine their living conditions and circumstances to a significant degree. It is thus no longer only governments which are in a position of power with regard to citizens. This difference in power is particularly expressed in organisations which possess financial and technical resources which individuals do not have and/or organisations which are oligopolies.[[31]](#footnote-31) Elsewhere in the literature mention is made of differences other than in terms of financial power, for example also the difference in knowledge.[[32]](#footnote-32) In this framework the literature also explicitly points out that the activities of these organisations entail risks for individual citizens or society as a whole which essentially differ from the risks which are related to the activities of natural persons.[[33]](#footnote-33)
4. The societal development which this trend specifically causes – and to which explicit reference is made in this framework – is the phenomenon of ever-increasing globalisation.*[[34]](#footnote-34)*
5. This development is also the basis of the work of a prominent author in the area of commercial enterprises and human rights, Prof. Cees Van Dam. He aptly describes the relationship between globalisation and the increasing attention for human rights with the words *“Trade has been globalised – justice not yet”.[[35]](#footnote-35)* Whereas constitutional rights were once established to protect individual citizens against the state as authority, as a result of the aforementioned globalisation multinationals, in particular, are, in his opinion, now equally powerful societal factors.[[36]](#footnote-36)
6. The first judgments in which horizontal effect was accepted, are based on the presence of inequality of power for a good reason.[[37]](#footnote-37) Inequality of power thus recurs in our national case law and literature with good reason as the argument for a far-reaching horizontal effect.[[38]](#footnote-38) For example, Deputy Procurator General Langemeijer recently concluded as follows in relation to a legal relationship in which a difference in power is by definition present, i.e. labour law:

*“2.18 Various authors are among the proponents of a far-reaching or even a ‘direct’ consequential effect of fundamental rights in the employment relationship. The ‘vertical’ authority relationship and the de facto inequality of power between the employer and the employee (because of the dependence of employees in keeping their employment contract as a source of income from labour) in their eyes justify a strong degree of consequential effect of fundamental rights in employment law relationships****.*** *(...)”* [[39]](#footnote-39)

1. In the opening arguments and in the summons[[40]](#footnote-40) detailed attention was paid, with reference to John Ruggie, to the governance gap relating to globalisation, which entails that (national) governments and public institutions are not properly able to regulate multinational companies. In addition, it was made clear how much power a handful of oil and gas companies had in the past decades and that they form an oligarchy which with lobby practices and PR campaigns have great influence on climate regulations and the energy transition as such, now and in the future. There is a large economic power due to the tens of billions which RDS is annually continuing to invest in fossil and the influence which these actions give it on the market. The consumer is dependent in this respect on what energy products the biggest energy companies in the world want to offer him or her. It was then explained that through its concern policy RDS has control over 1.2% of global emissions. The control which RDS has over these emissions is, moreover, greater and more direct than the control which a state has over the emissions of its citizens and companies.
2. This gives RDS a special position of power compared to vulnerable interests such as the environment, nature, eradicating poverty, food and water security, and the right to life and health and a peaceful family life of numerous individuals, including the over 17,000 individual claimants. The difference in power between RDS and an individual citizen is obvious.
3. Taken together the aforementioned circumstances entail that RDS has an essential influence on the energy transition and has a very exceptional position of power in relation to causing and preventing dangerous climate change, which power position by its nature, scope and control at the very least is comparable to that of a state. In the opinion of Milieudefensie et al. this justifies and necessitates a significant weighing of the human rights at issue.
4. If there is one case where the difference in power is so clearly present and the private party against which suit is brought with regard to power and influence plays such a large role with regard to the issue, that it even exceeds the role of a state, it is this one. In line with this Milieudefensie et al. believes that this District Court can also take account of the limitation clauses laid down in human rights provisions, which in the case of Article 8(2) of the European Convention on Human Rights has a proportionality and subsidiarity review.[[41]](#footnote-41) In the next part of the oral arguments Mr Cox will show in the discussion of the inconvenience of the measures to be taken that RDS does not satisfy that proportionality and subsidiarity review and it in any event cannot derive any justification ground therefrom.[[42]](#footnote-42)
5. A comparison can rightly be drawn in this case between RDS and a state with regard to position of power and influence on the problem. In the specific case of RDS there is therefore no good argument to attribute less weight to the human rights at issue, than was assumed by the Netherlands Supreme Court in the Urgenda case. If human rights which carry significant weight cannot be invoked against a private party like RDS, then when can they? As stated, this District Court has this discretion, and the need has never been so high to also use that discretion.

**UN Guiding Principles and soft law**

1. The foregoing applies all the more as RDS itself also acknowledges that the governance gap exists and that it is difficult to regulate. It is even taking advantage of this.
2. The summons makes reference to a letter of the RDS board of directors of 2014, intended for its shareholders and investors, in which it is stated that RDS assumes that the fossil industry will not be (cannot be) properly regulated nationally and internationally and that reining in the fossil industry will have little to no chance of succeeding.[[43]](#footnote-43)
3. Such an acknowledgement also ensues from the fact that RDS has committed itself to the UN Guiding Principles on Business and Human Rights. As explained in the summons[[44]](#footnote-44) and the opening arguments, the UN Guiding Principles are the product of an attempt of both states and large multinational companies to close the governance gap. If because of this governance gap it is so difficult to regulate companies in a globalised economy, companies will have to self-regulate and companies, in addition to states, have an independent obligation to respect human rights and prevent violations thereof. This is the central idea behind the UN Guiding Principles.
4. Against this background it is bitter to conclude that RDS is asserting in these proceedings that invoking of the UN Guiding Principles cannot succeed, because the matter only concerns soft law, which is not legally binding. Equally bitter is its previously discussed argument that human rights are either not at issue at all, or that in the consideration of interests to be made in this matter, these human rights do not carry greater weight than any other interest at issue.   
   When push comes to shove, according to RDS, commitment to the UN Guiding Principles does not really mean very much. Milieudefensie et al. believes that RDS cannot maintain these defences, in view of its own choice to be bound by the UN Guiding Principles.
5. Milieudefensie et al. cannot follow RDS’ position in other respects either. In the summons, in Chapters X.5 through X.8, four of the soft law sources relevant for this case are mentioned, for which it is explained that each and every one of them provides (extra) support for the claim of Milieudefensie et al.
6. In line with the Urgenda case the case law shows that to an increasing extent significance is attributed to soft law when fleshing out open standards.[[45]](#footnote-45) This legal development is also completely comprehensible. Where mandatory and clear legal rules are lacking, the court will need objective supporting arguments. Soft law is eminently suitable for this.[[46]](#footnote-46) This also aligns with the intention of the legislator in the supplementary function of fairness (Art. 3:12 Dutch Civil Code) and what is socially acceptable (Art. 6:162 Dutch Civil Code). Practice therefore teaches that soft law often serves to pave the way for *hard law.[[47]](#footnote-47)* As explained in the opening arguments, John Ruggie also sees a potential solution for closing the governance gap in the conversion of international soft law, such as the UN Guiding Principles, into hard law in concrete cases.[[48]](#footnote-48)
7. In the case law of the European Court of Human Rights, value is attributed to soft law via the ‘common ground’ method, such as audio standards of the WHO.[[49]](#footnote-49) The Netherlands Supreme Court therefore applied this approach in the Urgenda case, which is justified by the fact that these (quote) “*rules and agreements form the expression of a very widely supported view or understanding (...)*”.[[50]](#footnote-50)
8. In his handbook on liability law, the aforementioned Van Dam therefore asserts (quote):

*“The UNGPs do not contain any binding obligations, but because many companies commit themselves to the UNGPs, this behaviour is increasingly becoming a part of what is socially acceptable for a company within the meaning of Art. 6:162 of the Dutch Civil Code.” [[51]](#footnote-51)*

1. According to Milieudefensie et al., because of the explicit link between dangerous climate change and human rights, the human rights standards in the soft law sources, mentioned in the summons, must be attributed value in the weighing of interests. Contrary to what RDS asserts, dangerous climate change does indeed fall under the human rights referred to in the UN Guiding Principles. The Special Rapporteur states in this respect (quote):

*“(...) As a first step, corporations should comply with the Guiding Principles on Business and Human Rights as they pertain to human rights and climate change.”[[52]](#footnote-52)*

1. Just as according to the Netherlands Supreme Court it was no longer an option for the State to do too little, Milieudefensie et al. believes that soft law points out that for RDS the time has come to take action. An Interpretive Guide of the UN Guiding Principles sets out that it is no longer *optional* for companies to respect human rights and that such is not limited to the mere compliance with domestic law in relation to human rights.[[53]](#footnote-53)
2. Milieudefensie et al. believes its position is reinforced by the fact that in Dutch case law a development can be seen that in the wrongfulness assessment, more and more decisive influence is attached to non-binding rules, for example when it comes to cases in which private regulations or codes of conduct common in the industry are at issue.
3. This development was confirmed with the Achmea/Rijnberg case. This case, completely in line with the already discussed horizontal effect of fundamental rights, concerned an insurer which had carried out a personal investigation into one of its clients, which breached the privacy right of that customer. A significant weight was attributed to this privacy right. In line with the standard case law, the Netherlands Supreme Court stated *a priori* that such an infringement is in principle wrongful, but that a justification ground can remove the wrongful character from the investigation. The Netherlands Supreme Court then considered that in the assessment of the justification ground, connection had to be sought with the principles of proportionality and subsidiarity, for which, in the opinion of the Netherlands Supreme Court, a code of conduct followed by the insurer was to explicitly be taken as the starting point.*[[54]](#footnote-54)*
4. Up until the Achmea/Rijnberg case, in the Netherlands private regulations, such as codes of conduct which companies have committed to, can be deemed ‘only’ one of the circumstances which carry weight in the assessment of wrongfulness. In this judgment, however, unequivocally and in general wording soft law is given a central role in the assessment. This aligns with a trend in lower case law in which the following adage appears to prevail: ‘agreement (on the applicability of private regulations) is application of those private regulations’.[[55]](#footnote-55)
5. The Netherlands Supreme Court subsequently extended this line of jurisprudence in, inter alia, the Graafrichtlijn case, which concerned the elaboration of the required care in relation to excavation work. Where the Court of Appeal still spoke of ‘best practice’, according to the Netherlands Supreme Court, in the elaboration of the duty of care *in principle* alignment was to be sought with the excavation guidelines.[[56]](#footnote-56) The reason for this was the fact that the guidelines had been compiled by a broad, technically skilled group and consequently thus forms a representation of the opinions applicable within the professional group regarding diligent action.[[57]](#footnote-57) There is a similar kind of consensus that companies must respect human rights, as well as with regard to what must happen to prevent dangerous climate change.
6. Furthermore, in the same line a judgment was recently passed regarding the liability of a NVM mortgage broker, who had acted in contravention of NVM measurement standards.[[58]](#footnote-58) Where the Advocate General showed some reserve in the weight to be attributed to private regulation in relation to the duty of care, the Netherlands Supreme Court viewed this differently. The breach of the NVM standard was directly decisive in this judgment with regard to assessing the wrongfulness.
7. This trend can also be seen abroad, where, for example, in the United Kingdom in the Vedanta decision it was held in the same sense that voluntarily (and publicly) committing to a specific policy, has an influence on the legal obligations of a concern.[[59]](#footnote-59)
8. Against the background of the above judgments and the application in lower court case law, private regulations, such as a code of conduct, have turned out not to be merely ‘guidance’ for the court.[[60]](#footnote-60) This is despite the fact that such regulations are to be characterised as soft law. No turnaround need be expected in this trend according to the literature.[[61]](#footnote-61)
9. In view of the foregoing this District Court can and must, when assessing the required duty of care of RDS, therefore also attribute significant weight to the sources of soft law cited and explained in the summons and during these days of oral arguments. This is also all the more appropriate and justified when considering that RDS itself internationally, openly no less, has committed itself to those sources.
10. Milieudefensie et al. concludes that on the basis of the societal duty of care, fleshed out on the basis of the Kelderluik criteria (i) and (iii), human rights law and soft law, RDS is subject to a duty of care to respect human rights and contribute to preventing dangerous climate change. All perspectives discussed point in the same direction in the weighing of interests to be made.

**(ii) the knowledge and foreseeability of the damage**

1. Partly in connection with the thirteenth question of the District Court, I will now go into the second Kelderluik criterion and RDS’ defence that its knowledge on climate change came from the public domain and it consequently did not have any unique knowledge.
2. Milieudefensie et al. states *a priori* that this assertion is irrelevant in relation to the weighing of the factors which Milieudefensie et al. is seeking. The knowledge requirement, entailing that the societal duty of care is intended to protect interests which the perpetrator could and should have been aware of, does not entail that the knowledge of the perpetrator must be unique.[[62]](#footnote-62) It also ensues from the Urgenda judgment that the relevant factor is only whether there is knowledge and foreseeability of the damage and not that there must be unique knowledge.[[63]](#footnote-63) RDS is thus creating an obstacle which does not legally exist.
3. As has been explained in detail in the summons and the statement explaining the amendment of the claim, in the 1980s and 1990s there was sufficient knowledge and foreseeability on the part of RDS.[[64]](#footnote-64) In essence this knowledge was already present and in development since the 1950s.[[65]](#footnote-65)
4. Moreover, RDS also took measures as a result of the knowledge it possesses. A telling example, which has received a lot of attention in the media, is RDS’ raising its gas production platform “Troll A”. The platform was modified for tens of millions of dollars back in 1989 to be able to withstand the rising sea level and more powerful waves and storms expected by RDS – as a result of climate change.[[66]](#footnote-66) This shows that RDS, when it comes to its own assets, does - indeed - take the consequences of climate change particularly seriously and, moreover, is willing to pay a lot of money for it.
5. There in any event can no longer be any discussion regarding knowledge and foreseeability on the part of RDS as of 2007. In the summons and the statement explaining the amendment of the claim of 6 November 2020 it was explained that RDS chose precisely as of 2007 to in many ways put itself on a collision course with the global climate goal.[[67]](#footnote-67) According to Milieudefensie et al. this entails that the actions of RDS must all the more be deemed extraordinarily careless and thus wrongful.
6. It has been explained in the opening arguments how RDS takes measures to protect its business model against accelerated introduction of climate regulations, the loss of societal support for its business activities, against a reduced demand for fossil fuels and against potentially successful climate lawsuits like this one. It can be concluded that there was knowledge of and foreseeability of dangerous climate change on the part of RDS, at the latest since 2007. This knowledge and foreseeability did not cause RDS to take measures, or not to take the measures which are necessary to prevent dangerous climate change. This is extremely careless and consequently wrongful.
7. The knowledge available at RDS can be qualified as ‘unique’ in another context. That the knowledge present at RDS in 2007 was also publicly available, does not entail that RDS – with all the (climate) scientists in its employ – possessed the same kind of knowledge as the average citizen. Availability of information says nothing about whether this knowledge is being found and – more importantly – understood by citizens. The actual understanding and particularly also realising of the seriousness of the problem requires an in-depth understanding of the subject matter that may not be quickly assumed to exist on the part of the average citizen.
8. RDS argues in this respect in the discussion of ‘the chance of damage as a result of lack of attention and lack of care’, that it was common knowledge that CO2 emissions contribute to risks of dangerous climate change. According to RDS, this circumstance should be to its advantage, as it should not have to pay attention to the lack of care of others and that it does not believe that it has to protect citizens from a danger that is the result of the citizens’ own careless or negligent actions.[[68]](#footnote-68)
9. This position is illustrative for the way in which RDS grossly fails to understand its own position and the position of the average citizen. It cannot be maintained that the average citizen is sufficiently aware of the chance of, and the catastrophic consequences of, dangerous climate change. An understanding of the more technical aspects, such as the delay in the climate system, the cumulative character of the atmospheric CO2 concentration, the risk of ‘tipping points’, the very limited extent to which CO2 emissions are still possible, the emissions gap between government measures worldwide and the Paris goal and the degree in which the further production and use of fossil fuels cannot be reconciled with the prevention of dangerous climate change, is not self-evident even after delving into public sources.
10. This applies all the more with regard to the seriousness of the consequences which arise when dangerous climate change manifests itself. Without exaggeration it can be stated that many citizens are still under the impression that climate change will ‘merely’ result in the world becoming a few degrees warmer, without understanding the catastrophic consequences this entails worldwide. Precisely for this reason account must indeed be taken of the lack of care of citizens. There is a good reason why the Urgenda judgments have been given an exceptionally broad factual base.
11. It is illustrative that in a rich and highly-educated country like the Netherlands, the leader of a national political party, following the national Climate Agreement, can still make the following kind of statements on national television (quote):

*“Even if you believe all of it, this pseudo-science about CO₂, which is simply the gas found in cola, it is carbon dioxide, this is not something which in itself is toxic. Plants breath it in; it is part of the ecological cycle. A kind of mysticism has arisen that we must eradicate it, as if it is dangerous.”[[69]](#footnote-69)*

1. The fact that an elected representative of the people can make these kinds of statements in a talk show without anyone correcting him – indeed, with the leader of a coalition party sitting across from him – illustrates that the public at large cannot be expected to have sufficient knowledge and awareness of the climate problem, as RDS argues.   
     
   The “wait and see” attitude of RDS with regard to ‘the market’ therefore cannot be justified. This is aside from the question whether the market offers sufficient alternatives with regard to the use of fossil fuels. As stated, RDS is in fact trying to protect its fossil business model in all kinds of ways.
2. This is also explained in the article submitted as Exhibit 332, in which the role and responsibility of oil producers for the climate problem has been studied from a historic perspective. The authors assert in relation to the large fossil producers (quote):   
   “*(...) as major corporations with a high level of internal scientific and technical expertise, they were aware of and in a position to understand the available scientific data.”[[70]](#footnote-70)*
3. This knowledge has only led to the protection of the own business model and combating effective climate regulations, so that (quote):  
   “*In effect, the industry created a self-fulfilling prophecy: The absence of carbon regulation would ensure that fossil fuels would continue to be a good investment, and the companies would maximize profits for their shareholders to the detriment of the world at large by continuing to expand fossil fuel discovery and development.”[[71]](#footnote-71)*
4. Continuing to invest in fossil energy in this manner also entails that investments in sustainable technology are lagging and no real alternative is being created for the consumer (quote):  
   “*The major investor-owned fossil energy producers companies have done all of this even while an alternative vision had been articulated and was possible. Through their actions, they have not only invested in, but sought to guarantee, a future that serves the interests of their shareholders, employees, and executives, but threatens the health, well-being and prosperity of virtually everyone else. Their power and influence on the global response to climate change is substantial. The fact that others – governments, emitting industries, and individuals – have responsibilities, too, does not obviate this point”.[[72]](#footnote-72)*
5. This articles states specifically with regard to RDS (quote):  
   “*Shell explicitly acknowledges that the energy futures they envision will have highly disruptive consequences, overshoot[ing] the trajectory for a 2˚C goal” (Royal Dutch Shell plc 2013). Yet, knowing this, they continue to bank on a high carbon future. (…) The fossil fuel industry is knowingly participating in a pathway by which, in the words of Shell CEO Ben van Beurden, climate change “is just going to happen whether we like it or not ”.[[73]](#footnote-73)*
6. Contrary to the picture that RDS is trying to create with the green ambitions it has presented, it has still not substantially deviated from its fossil business strategy.
7. This is now turning out to also be causing problems within RDS internally. Recent reporting in the media[[74]](#footnote-74) shows that recently various top managers of the green sectors of the company resigned, because the company’s transition to sustainable operations was not going fast enough (quote):  
     
   *“Some executives have pushed for a more aggressive shift from oil but top management is more inclined to stick closer to the company’s current path (…) “People are really questioning if there will be any change at all,” said one of the people familiar with the internal tensions.”*
8. In connection with this report the Financial Times cites an earlier statement of CEO Ben van Beurden (quote): *“Mr van Beurden told the Financial Times last year his “single biggest” regret would be retreating from the oil business prematurely.”[[75]](#footnote-75)*
9. Indeed, no significant changes need be expected of someone whose biggest regret would be to get out of the fossil industry a day too early.
10. In view of the decades of professional knowledge and foreseeability on the part of RDS, no other conclusion is possible than that RDS was and is legally bound to take sufficient (safety) measures to help prevent the further manifestations of the global danger of climate change. RDS has not done this up to now, nor does it intend to do so moving forward. In a moment Mr Cox will go into RDS’ plans and ambitions in further detail.
11. The citizens’ position – wrongly – outlined by RDS first brings me to the following point.

**Relativity and ‘in pari delicto’ defence**

1. RDS has, in short, asserted that the relativity requirement has not been satisfied, because Milieudefensie et al. is participating in the reproached conduct, as climate change is being caused by all of us, and Milieudefensie et al. emits CO2 too.
2. This “in pari delicto” defence entails that a claim of an injured party must be rejected, if that injured party itself engages in the conduct of which the perpetrator is accused.[[76]](#footnote-76) This is not a classic relativity defence, in such sense that the breached standard as such does not purport to protect the interests of Milieudefensie et al., nor is Article 6:163 of the Dutch Civil Code applicable here, as the matter concerns a suit seeking a court order and not a claim for damages. RDS’ defence discusses whether Milieudefensie et al. is breaching the same standard as RDS.[[77]](#footnote-77)
3. Milieudefensie et al. believes that this defence of RDS cannot succeed, in view of the special nature of the societal duty of care which is at issue. It cannot be reasonably asserted with regard to any of the claimants that he or she is breaching the societal duty of care which Milieudefensie et al. believes RDS is breaching.
4. In the consideration which this District Court must make, in the opinion of Milieudefensie et al., the issue is a breach of a standard, when, inter alia, there is a sufficient degree of knowledge of the danger of climate change present. It has just been explained that this is not the case on the part of the citizens. Nor can it be said that citizens have been offered a real alternative. It furthermore cannot be maintained that a random claimant is in a comparable (power) position in relation to the global climate problem or that he or she, because of a substantial horizontal effect, can be held accountable for a human rights violation. As a final note, it can be pointed out that none of the claimants have committed to the UN Guiding Principles. As has been extensively substantiated, RDS’ position is special and consequently incomparable to the claimant NGOs or the individual citizens.
5. Because of the foregoing Milieudefensie et al. can also remove RDS’ fear that the awarding of Milieudefensie et al.’s claim would open the door for claims of everyone against everyone else.[[78]](#footnote-78)
6. The foregoing really already ensues from the translation and the meaning of the adage on which the defence is based, i.e.: *“in the event of equal wrongfulness the situation of the defendant is stronger”.[[79]](#footnote-79)* Or in other words: *“If the parties have each acted inappropriately to an equal degree, the position of the defendant is the strongest. If therefore both the claimant and the defendant can be reproached of acting contrary to good morals, and both parties to the same degree, the case will be allowed to take its course.”[[80]](#footnote-80)*
7. A successful invoking of the pari delicto defence thus not only requires that the parties have breached the same standard, but it is also required that the degree in which the parties breached the standard is of the same extent.[[81]](#footnote-81) This same extent is very far from present.

**The Court’s task**

1. RDS furthermore argues that this District Court would be exceeding the limit of the adjudicatory and law forming task if Milieudefensie et al.’s claim were to be awarded.
2. The only issue is whether under Article 3:296(1) of the Dutch Civil Code, one private party must be protected against a wrongful act of the other party. Milieudefensie et al.’s claim is based on an open standard which is rooted in law. A legal standard which for decades has turned out to be suitable – and according to international and national prevailing legal view is intended – to prevent socially unwanted conduct in the light of the “zeitgeist”.
3. That – as RDS asserts – in the Urgenda case it was specifically recognised that the civil court cannot make political choices, is logical as the claim there was directed against the State. This case, however, is concerned with a claim against a private party. Contrary to the Urgenda case, this case in any event cannot revolve around the question whether the matter concerns a legislative order and it does not concern the relationship in the ‘trias politica’ between legislator and judiciary. In addition, the political decision-making process regarding the question *what* must be done has already occurred in an international respect. There is already a universally supported and accepted safety standard, to which states have committed themselves. The question is thus no longer *what* but only *how* it must be done. But the *how* can by definition not end up being lower than the *what*. This has already been explained during the oral arguments concerning the ‘double challenge’ on day 2 of the session and Mr Cox will explain in a moment why RDS should not be subject to a lower emissions reduction target than the global emissions reduction target.
4. RDS furthermore argues that it is not up to RDS and thus also not up to this District Court, but to states to provide protection against dangerous climate change. Milieudefensie et al. has already sufficiently explained the crucial role of non-state actors like RDS and will show that states are not doing enough and are not sufficiently capable, without the commitment of market parties like RDS, to prevent dangerous climate change.
5. It would then most definitely fit in with the role of this District Court to set a lower limit both with regard to the State of the Netherlands, and with regard to a large market party with a particularly influential position like RDS, by which it will be legally bound.
6. The latter point was explicitly recognised by the Netherlands Supreme Court in the Urgenda case. It has thus turned out possible with regard to a state to carry out a judicial review as to whether its actions comply with the legal rules that apply to prevent dangerous climate change, without placing itself in the (political) policy-making and decision-making discretion of this state.
7. It is equally possible for this District Court to make a judicial determination on the part of RDS, what on the basis of the societal duty of care is to be deemed the lower limit. RDS is then – just like the State of the Netherlands – free in determining how and with what measures of concern policy it will comply with the order to be imposed.
8. It cannot be the case that under Article 3:296(1) of the Dutch Civil Code it is impossible for citizens to hold multinationals liable for their influence on dangerous climate change, regardless of whether states take sufficient action to prevent this worldwide danger or are themselves not able to sufficiently regulate multinationals like RDS. This would make tackling climate change practically impossible.

**Conclusion**

1. In the foregoing Milieudefensie et al. has explained that the (first three) Kelderluik criteria, human rights law and soft law all point in the same direction. Namely, that on the basis of the societal duty of care, RDS is subject to a duty of care to contribute to preventing dangerous climate change. The global community has established a universally supported and accepted *de facto* safety standard.   
     
   Milieudefensie et al. believes that under domestic law, this *de facto* safety standard has an independent legal significance for RDS via the societal duty of care.
2. Mr Cox will explain hereinafter what concrete elaboration this safety standard should have in this specific case, on the basis of the best available and widely recognised scientific findings, regarding what reduction percentages should be achieved to prevent dangerous climate change (the claim). Attention will also be paid in this respect to the Kelderluik criteria which have not yet been discussed, being the nature of the conduct and the convenience (or inconvenience) of the measures to be taken, and the causality defence of RDS that the awarding of the claim will not contribute to preventing dangerous climate change. It is then up to this District Court to establish the lower limit to be applied in this respect.

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1. K.J.O. Jansen, in: GS Onrechtmatige daad, art. 6:162 BW, aant. 6.3.9.7 with reference to Asser/Hartkamp & Sieburgh 6-IV 2015/75; A.J. Verheij, Onrechtmatige daad (Mon. Privaatrecht no. 4), Deventer: Kluwer 2019, no. 16; T. Hartlief, RMTh 2019, p. 21; and K.J.O. Jansen, Informatieplichten (R&P no. CA5) (diss. Leiden), Deventer: Kluwer 2012, para. 4.1.3 (with mention of other authors). [↑](#footnote-ref-1)
2. L.T. Visscher, Een rechtseconomische analyse van het Nederlandse onrechtmatige daadsrecht (diss. EUR), Rotterdam: EUR 2005, p. 65. [↑](#footnote-ref-2)
3. Procurator General Langemeijer and Wissink in the Urgenda case, ECLI:NL:PHR:2019:887, para. 2.23, with further references there. See in this respect the questions formulated by Prof. Cees van Dam, on the basis of which it can be assessed whether a business is acting with sufficient care, in particular in relation to human rights. These too show great similarities with the Kelderluik criteria. In: C. Van Dam, ‘Onderneming en mensenrechten’ Speech University of Utrecht, The Hague: Boom Juridische uitgevers, 2008, pp. 58 – 63. [↑](#footnote-ref-3)
4. District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145. [↑](#footnote-ref-4)
5. See para. 4.63. [↑](#footnote-ref-5)
6. See also the opinion of Deputy Procurator General Langemeijer and Advocate General Wissink, ECLI:NL:PHR:2019:887 for: Netherlands Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (Urgenda), under 2.31 and under 2.72: “The common ground method is somewhat comparable to the consequential effect which domestic courts can attribute to treaty provisions which do not have direct effect and ‘soft law’ when fleshing out open standards in domestic law.” [↑](#footnote-ref-6)
7. See para. 4.63. [↑](#footnote-ref-7)
8. Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment (Exhibit 270), p. 8 and p. 15. [↑](#footnote-ref-8)
9. Netherlands Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006. [↑](#footnote-ref-9)
10. Ibid, para. 5.6.1, with reference to the case law discussed in 5.2.1 – 5.5.3. [↑](#footnote-ref-10)
11. Ibid, para. 5.4.3. [↑](#footnote-ref-11)
12. Ibid, paras. 5.4.2. and 6.3. [↑](#footnote-ref-12)
13. Ibid, para. 6.4. [↑](#footnote-ref-13)
14. Summons, para. 399. [↑](#footnote-ref-14)
15. Relevant articles are: Art. 3 (right to life, liberty and security of person) and Art. 12 (protection from arbitrary interference with privacy, family). [↑](#footnote-ref-15)
16. Relevant articles are Art. 6 (right to live) and Art. 17 (protection from arbitrary interference in private life). [↑](#footnote-ref-16)
17. The relevant article is Art. 11 (right to adequate standard of living). [↑](#footnote-ref-17)
18. Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment (Exhibit 270), p. 8. [↑](#footnote-ref-18)
19. Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment (Exhibit 270), p. 8. [↑](#footnote-ref-19)
20. Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment (Exhibit 270), p. 18. [↑](#footnote-ref-20)
21. Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment (Exhibit 270), from p. 18. [↑](#footnote-ref-21)
22. See in this respect the quote of Prof. Hartkamp, as cited in the summons, para. 667, in: Asser/Hartkamp 3-I 2015/226 (*Europees Recht en Nederlands Vermogensrecht).* [↑](#footnote-ref-22)
23. Proceedings II 1976/77, 35, p. 2127. See also: ‘Boesjens’ sliding scale’; *Parliamentary documents* *II*, 1975/76, 13 872, no. 3, pp. 15-16. See also Proceedings II 1976/77, 35, p. 2127; J.M. Emaus, Handhaving van EVRM-rechten via het aansprakelijkheidsrecht. Over de inpassing van de fundamentele rechtsschending in het Nederlandse burgerlijk recht, The Hague (Boom Juridische Uitgevers) 2013 (diss. Utrecht), p. 20. [↑](#footnote-ref-23)
24. Which, for example, appears from the fact that one author places a case under the heading of direct effect and the other places it under indirect effect. See in this respect, for example, Hartkamp, in: Asser/Hartkamp 3-I 2019/228 with reference to various authors, as well as Advocate General Koopmans in para. 13 of his opinion for Netherlands Supreme Court 18-06-1993, ECLI:NL:HR:1993:ZC1002 with references there. [↑](#footnote-ref-24)
25. S.D. Lindenbergh, ‘Constitutionalisering van contractenrecht. Over de werking van fundamentele rechten in contractuele verhoudingen’, *WPNR* 2004, p. 979. [↑](#footnote-ref-25)
26. Cf.: Cherednychenko, O.O., 2007. Fundamental rights and private law: A relationship of subordination or complementarity?. Utrecht Law Review, 3(2), pp. 12 et seq. This also appears from what is described in footnote 24. See furthermore: Noorlander and Nehmelman, Horizontale werking van grondrechten (HSB), Deventer: Kluwer (2013), p. 312. [↑](#footnote-ref-26)
27. This is also the conclusion of Emaus in her dissertation: J.M. Emaus, Handhaving van EVRM-rechten via het aansprakelijkheidsrecht. Over de inpassing van de fundamentele rechtsschending in het Nederlandse burgerlijk recht, The Hague (Boom Juridische Uitgevers) 2013 (diss. Utrecht), p. 21. [↑](#footnote-ref-27)
28. According to Hartkamp: “As stated, the European Court of Human Rights has not attributed direct horizontal effect to the rights provided for in the European Convention on Human Rights, leaving the matter up to the domestic courts. In the Netherlands the problem will be resolved in the same manner as the fundamental rights laid down in the Constitution: the court is free in its interpretation of the convention and can attribute a horizontal effect thereto if the court believes this to provide the desired outcome.”; Asser/Hartkamp 3-I 2019/226. [↑](#footnote-ref-28)
29. Asser/Hartkamp 3-I 2019/20. [↑](#footnote-ref-29)
30. See for example Netherlands Supreme Court 09 January 1987, NJ 1987, 928 (Spied-upon mother on benefits) where the mere infringement of the interest laid down in Article 8 of the European Convention on Human Rights in principle is deemed wrongful. In the same sense: Netherlands Supreme Court 18-04-2014, ECLI:NL:HR:2014:942, with notes by M.M. Mendel and H.B. Krans (Achmea/Rijnberg) and Netherlands Supreme Court 31-05-2002, ECLI:NL:HR:2002:AD9609, with notes by J.B.M. Vranken (Aegon/K). See recently in: ECLI:NL:GHSHE:2020:1448. Or in case of lower courts: District Court of Leeuwarden (preliminary relief judge) 13-04-2011, ECLI:NL:RBLEE:2011:BQ1161. [↑](#footnote-ref-30)
31. Noorlander and Nehmelman, Horizontale werking van grondrechten (HSB), Deventer: Kluwer (2013), pp. 304-305. See also: Gerards, in: De invloed van fundamentele rechten op het materiele recht, Kluwer 2013, p. 6 et seq. and the references set out there. [↑](#footnote-ref-31)
32. J.M. Emaus, Handhaving van EVRM-rechten via het aansprakelijkheidsrecht. Over de inpassing van de fundamentele rechtsschending in het Nederlandse burgerlijk recht, The Hague (Boom Juridische Uitgevers) 2013 (diss. Utrecht), p. 37. [↑](#footnote-ref-32)
33. R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten (Handboeken staats- en bestuursrecht)*, Deventer: Kluwer 2013, pp. 304-305, with reference to an apt quote of Clapham: *“(…) the emergence of new fragmented centres of power, such as associations, pressure groups, political parties, trade unions, corporations, multinationals, universities, churches, interest groups, and quasi-repression, and alienation in a variety of new bodies, whereas once it was only the apparatus of the State which was perceived in the doctrine to exhibit these characteristics. This societal development has meant that the definition of the public sphere has to be adapted to include these new bodies and activities.”* [↑](#footnote-ref-33)
34. See in the context of the European Convention on Human Rights: R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten (Handboeken staats- en bestuursrecht)*, Deventer: Kluwer 2013, pp. 316. [↑](#footnote-ref-34)
35. C. Van Dam, ‘Onderneming en mensenrechten’ Speech University of Utrecht, The Hague: Boom Juridische uitgevers, 2008, pp. 17 et seq. [↑](#footnote-ref-35)
36. C. Van Dam, ‘Onderneming en mensenrechten’ Speech University of Utrecht, The Hague: Boom Juridische uitgevers, 2008, p. 24. [↑](#footnote-ref-36)
37. J.A. Hofman and B.M.J. Van der Meulen, in their note with Netherlands Supreme Court 05-06-1987, ECLI:NL:PHR:1987:AB9113, *AB* 1988, 276, under 4: *“The jurisprudence known up to now (e.g. Court of Appeal of Arnhem — ground lease section — 15 Nov. 1958, NJ 1959 no. 472, Pres. of District Court of The Hague 9 June 1987, AB 1987, 580, Netherlands Supreme Court 30 March 1984, AB 1984, 366) in which horizontal effect appears to have been acknowledged, usually concerns cases in which one citizen, contrary to the presumed equality of citizens in private law, de facto finds himself in a societal position of power with regard to another citizen, like the employer with regard to the employee or the ground lessor with regard to the ground lessee, etc. These relationships could be referred to as pseudo-vertical; they look like the citizen-government relationship so that the fundamental rights can be applied to it with the same rationale.”* [↑](#footnote-ref-37)
38. Even though Noorlander and Nehmelman are not proponents of direct horizontal effect, they believe that under certain circumstances a direct horizontal effect may be appropriate, whereby, inter alia, a strong position of power is explicitly mentioned; R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten (Handboeken staats- en bestuursrecht)*, Deventer: Kluwer 2013, p. 309. [↑](#footnote-ref-38)
39. ECLI:NL:PHR:2019:631. [↑](#footnote-ref-39)
40. See, inter alia, paras. 691-710. [↑](#footnote-ref-40)
41. See in horizontal relationships, inter alia: NJ 1987, 928: Netherlands Supreme Court 09-01-1987, no. 12717 (Spied-upon mother on benefits), para. 4.6; Netherlands Supreme Court 18-04-2014, ECLI:NL:HR:2014:942, with notes by M.M. Mendel and H.B. Krans (Achmea/Rijnberg), para. 5.2.1; Opinion of Advocate General Hartkamp, for ECLI:NL:HR:2003:AL8442 (HIV test II), ECLI:NL:HR:2019:1834, para. 2.4.2; ECLI:NL:RBMNE:2019:2012, para. 4.6. See also: R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten (Handboeken staats- en bestuursrecht)*, Deventer: Kluwer 2013, p. 314 and p. 320. [↑](#footnote-ref-41)
42. The limitation clause of Article 2 of the European Convention on Human Rights is evidently not at issue. [↑](#footnote-ref-42)
43. Chapter VIII.2.1.3.c of the summons and Shell, 16 May 2014: *Shell* *letter in response to shareholders enquiries on climate change* p. 1 and 2 (Exhibit 199). [↑](#footnote-ref-43)
44. Summons, paras. 691-715. [↑](#footnote-ref-44)
45. According to Procurator General Langemeijer and Wissink with the Urgenda case, ECLI:NL:PHR:2019:887, 2.31. See also M.E. Coenraads and J.E.S. Hamster, Verantwoord ondernemen: van *soft law* naar harde verplichtingen via strategisch procederen, *TOP* 2019/8, p. 35 and the multitude of jurisprudence to which reference is made there. [↑](#footnote-ref-45)
46. See Asser/Hartkamp & Sieburgh 6-IV 2015/76 et seq.; K.J.O. Jansen, Groene Serie Onrechtmatige daad,

    art. 6:162 BW (2018), aant. 6.1.9 e.v. (with further references). [↑](#footnote-ref-46)
47. Procurator General Langemeijer and Wissink in the Urgenda case, ECLI:NL:PHR:2019:887, 2.32, with references there. [↑](#footnote-ref-47)
48. Exhibit 272, p. 329 [↑](#footnote-ref-48)
49. Procurator General Langemeijer and Wissink in the Urgenda case, ECLI:NL:PHR:2019:887, 2.31, with references in footnote 121. See also para. 715 of the summons. [↑](#footnote-ref-49)
50. Para. 6.3. [↑](#footnote-ref-50)
51. C. Van Dam, *Aansprakelijkheidsrecht*, Boom Juridisch 2020, nos. 1203-4. [↑](#footnote-ref-51)
52. Safe Climate, A Report of the Special Rapporteur on Human Rights and the Environment (Exhibit 270), p. 32. [↑](#footnote-ref-52)
53. Office of the High Commissioner of the United Nations; The Corporate Responsibility to Respect Human Rights, An Interpretive Guide, a report issued by the UNOHCHR, 2012, p. 159: *“it exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations. It therefore also exists independently of an enterprise’s own commitment to human rights. It is reflected in soft law instruments” such as OECD Guidelines (...) where business poses a risk to human rights, it increasingly also poses a risk to its own long-term interests.”* [↑](#footnote-ref-53)
54. Netherlands Supreme Court 18-04-2014, ECLI:NL:HR:2014:942, with notes by M.M. Mendel and H.B. Krans (Achmea/Rijnberg). See recently in a comparable case: ECLI:NL:GHSHE:2020:1448. [↑](#footnote-ref-54)
55. See for a detailed explanation of this conclusion from Menting’s dissertation: M. Menting, Industry Codes of Conduct in a Multi-Layered Dutch Private Law (diss. Tilburg), 2016, p. 227. See also: Menting, (R)Evolutie in het privaatrecht? Enkele beschouwingen over de rol van private regelgeving en de invloed van het EVRM naar aanleiding van HR Achmea/Rijnberg, *NTBR* 2015/6, p. 107. [↑](#footnote-ref-55)
56. Netherlands Supreme Court 25 May 2018, NJ 2019/295, with notes by Lindenbergh (Liander/Y). Also referred to as the ‘Graafrichtlijn’ case. [↑](#footnote-ref-56)
57. See also Lindenbergh in his note with the aforementioned case, under 8, who deems the reasoning to be convincing. [↑](#footnote-ref-57)
58. Netherlands Supreme Court 22 February 2019, NJ 2020/8. [↑](#footnote-ref-58)
59. UK Supreme Court, *Vedanta Resources PLC and anor. v Lungowe and others* [2019] UKSC 20, to be found via <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf>; M.E. Coenraads and J.E.S. Hamster, Verantwoord ondernemen: van *soft law* naar harde verplichtingen via strategisch procederen, *TOP* 2019/8, p. 36 [↑](#footnote-ref-59)
60. See Smeehuizen’s note, under 16-17; Netherlands Supreme Court 13-07-2018, ECLI:NL:HR:2018:1176, with notes by J.L. Smeehuijzen. [↑](#footnote-ref-60)
61. R.A.J. van Gestel, ‘Leidt terugtred van de wetgever tot een opmars van rechterlijke rechtsvorming en afbraak van democratische waarden?’, *Regelmaat* 2019/3 p. 239. [↑](#footnote-ref-61)
62. GS Onrechtmatige daad, art. 6:162 BW, aant. 6.3.8.3. [↑](#footnote-ref-62)
63. ECLI:NL:RBDHA:2015:7145, para. 4.63. [↑](#footnote-ref-63)
64. See Chapter VIII.2.1.2. of the summons. [↑](#footnote-ref-64)
65. See for an overview of this knowledge and development, Chapter VIII.2.1.2.b of the summons. [↑](#footnote-ref-65)
66. See para. 546 of the summons and footnote there. [↑](#footnote-ref-66)
67. See Chapter VIII.2.1.3 of the summons. [↑](#footnote-ref-67)
68. Paras. 495-503 of the statement of defence. [↑](#footnote-ref-68)
69. Thierry Baudet, (then) leader of the Forum voor Democratie, sitting across from the leader of the party forming part of the government coalition, the Christenunie, Gert-Jan Segers, on the talk show ‘Pauw’ on NPO1, June 2019. Fragment available via: <https://twitter.com/op1npo/status/1144715116463570944>. [↑](#footnote-ref-69)
70. Exhibit 332, p. 159. [↑](#footnote-ref-70)
71. Exhibit 332, p. 164. [↑](#footnote-ref-71)
72. Exhibit 332, p. 167. [↑](#footnote-ref-72)
73. Exhibit 332, p. 166. [↑](#footnote-ref-73)
74. See for example the Volkskrant newspaper, 8 December 2020, ‘Vergroening bij Shell gaat niet snel genoeg: managers zeggen baan op’ (<https://www.volkskrant.nl/nieuws-achtergrond/vergroening-bij-shell-gaat-niet-snel-genoeg-managers-zeggen-baan-op~bda85cea/>). [↑](#footnote-ref-74)
75. Financial Times, 8 December 2020, ‘Shell executives quit amid discord over green push’ (<https://www.ft.com/content/053663f1-0320-4b83-be31-fefbc49b0efc>). [↑](#footnote-ref-75)
76. K.J.O. Jansen, GS Onrechtmatige daad, art. 6:162 BW, aant. 7.3.4.2. [↑](#footnote-ref-76)
77. The second type of case of an IPD defence as distinguished by Van der Kooij, in addition to the type of case where someone causes (or perhaps better: elicits) the wrongful act through his own coercive conduct; Van der Kooij, ‘Relativiteit, causaliteit en toerekening van schade (R&P no. CA21)’ 2019/14.2. [↑](#footnote-ref-77)
78. Para. 7.2.4 statement of defence. [↑](#footnote-ref-78)
79. Sieburgh, in: Asser/Sieburgh 6-IV 2019/137 [↑](#footnote-ref-79)
80. A.L.M. Keirse & B.M. Paijmans , ‘In pari delicto; als de pot de ketel verwijt’ MvV 2017, vl. 7/8, p. 208. [↑](#footnote-ref-80)
81. I. Haazen, ‘Schade in een niet-rechtmatig belang’, *WPNR* 2009/6816, p. 831, note 43. In the same sense: Van der Kooij, ‘Relativiteit, causaliteit en toerekening van schade (R&P no. CA21)’ 2019/14.2, no. 542. [↑](#footnote-ref-81)