9

Duty of Care

*Christina Voigt and Joe Udell**

9.1 INTRODUCTION

One central aspect of climate litigation in recent years has been the recognition by courts that States – and now corporations – have a duty of care to address global warming. This development has occurred in both civil and common law jurisdictions, as judges have notably ordered governments to adopt more comprehensive climate policies with greater boldness and regularity based on this norm. This chapter will examine important trends in climate litigation with respect to the duty of care, identify emerging best practices from a range of cases, and analyse the potential for these emerging best practices to be replicated in other jurisdictions.

9.2 DUTY OF CARE IN CLIMATE LITIGATION

In a number of recent cases, climate litigants have successfully grounded their claims in a variety of tort law, constitutional rights, and statutory provisions.[1] This has included the tort of hazardous negligence under the Dutch Civil Code in *Urgenda Foundation v The State of The Netherlands*,[2] negligent conduct as applied to public authorities under the Belgian Civil Code in *VZW Klimaatzaak v Kingdom of Belgium and Others*,[3] and ecological damage under the French Civil Code in *Notre Affaire à Tous and Others v France*.[4] Courts have also found duty of care

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1 United Nations Environment Programme and Sabin Center for Climate Change, 'Global Climate Litigation Report: 2020 Status Review' (2020) <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> accessed 24 February 2024.

2 *Urgenda Foundation v The State of The Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of The Hague) (*Urgenda District Court*).

3 *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile) (*VZW Klimaatzaak First Instance*); *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023] 2022/AR/891(Cour d'appel de Bruxelles) (*VZW Klimaatzaak Appeal*).

4 *Notre Affaire à Tous and Others v France* [2021] No 1904967, 1904968, 1904972 1904976/4-1.

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violations under the rights to life and to private and family life of Articles 2 and 8 of the European Convention on Human Rights (ECHR) in *Urgenda*,[5] as well as various constitutional rights in *Neubauer and Others v Germany*,[6] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)*,[7] *GroundWork Trust and Vukani Environmental Justice Alliance Movement in Action v Minister of Environmental Affairs and Others*,[8] *PSB et al v Brazil*,[9] *Klimatická žaloba ČR v Czech Republic*,[10] *In re Greenpeace Southeast Asia and Others*,[11] and *Mathur and others v Her Majesty the Queen in Right of Ontario*.[12] This section will examine how courts in various jurisdictions have interpreted the duty of care owed by a State or corporation, their focus on minimum reasonableness standards, and their response to common defences.

9.2.1 *Interpreting the Standard of Care*

When a State's duty of care to mitigate climate change is an unwritten and/or open-standard norm, courts have relied on a range of sources to determine the contours of that standard, including international law such as the Paris Agreement, the best available science from the Intergovernmental Panel on Climate Change (IPCC), and international soft law, such as guidance from the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD).

9.2.1.1 International Climate Change Law

Courts have consistently referred to the Paris Agreement when considering a State's duty of care, including several landmark decisions described later such as *Urgenda* and *Neubauer*. Close to 200 nations came to a consensus on the historically ambitious treaty in December 2015, which aims to strengthen the global response to the threat of climate change by (1) holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the

[5] *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2018] ECLI:NL:GHDHA:2018:2610 (Hague Court of Appeal) (*Urgenda Court of Appeal*).

[6] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*).

[7] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)* [2018] 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia) (*Demanda Futuras Generaciones*).

[8] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2019] SAFLII 208 (ZAGPPHC) (*Groundwork Trust*).

[9] *PSB and others v Brazil* [2022] ADPF 708 (Federal Supreme Court of Brazil).

[10] *Klimatická žaloba ČR v Czech Republic* [2022] No 14A 101/2021 (Prague Municipal Court).

[11] *In re Greenpeace Southeast Asia and Others* [2022] Case No CHR-NI-2016-0001 (Commission on Human Rights of the Philippines).

[12] *Mathur et al v Her Majesty the Queen in Right of Ontario* [2020] ONSC 6918 (Superior Court of Justice) (*Mathur Strikeout*).

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temperature increase to 1.5°C above pre-industrial levels; (2) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas (GHG) emissions development, in a manner that does not threaten food production; and (3) making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development.[13] The instrument has been called 'the most important international agreement in history'[14] and a 'monumental triumph'[15] that 'sets the stage for progress in ending poverty, strengthening peace, and ensuring a life of dignity and opportunity for all'.[16]

The treaty espouses an equitable approach to climate change, with each Party communicating every five years nationally determined contributions (NDCs) that are considered the 'heart of the Paris Agreement'[17] and its long-term temperature goal. The language of Article 4(3) outlines a duty of care that requires each Party's NDC to 'represent a progression beyond the Party's then current [NDC] and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.[18] As Article 4(3) requires each NDC to reflect a Party's 'highest possible ambition'[19] and reflect 'its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances',[20] the relative content demanded of NDCs creates a due diligence standard of conduct that differs for each Paris Agreement party,[21] while the treaty's largely procedural reporting requirements establish obligations of result.

In addition to the Paris Agreement, national courts have referred to other international law instruments to determine a State's appropriate climate duties. For example, in *Thomson v Minister for Climate Change Issues*, the High Court of

[13] Paris Agreement (entered into force 4 November 2016) 3156 UNTS 79 (Paris Agreement) art 2(1)(a)–(c); UNFCCC Secretariat, 'COP 21 – Historical Paris Agreement Adopted' <https://unfccc.int/timeline/> accessed 27 February 2024.

[14] 'IGOs, Development Banks and UN Agencies React to Paris Agreement' (*IISD*, 7 January 2016) <https://sdg.iisd.org/news/igos-development-banks-and-un-agencies-react-to-paris-agreement/> accessed 27 February 2024.

[15] William Brittlebank, 'UN Chief Hails "Monumental" COP21 Climate Deal' (*Climate Action*, 14 December 2015) <www.climateaction.org/news/un_chief_hails_new_cop21_climate_deal> accessed 27 February 2024.

[16] ibid.

[17] UNFCCC Secretariat, 'Nationally Determined Contributions (NDCs)' <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs> accessed 28 February 2024.

[18] Paris Agreement (n 13) art 4(3).

[19] ibid.

[20] ibid. For a discussion on the duty of care established by art 4(3) of the Paris Agreement, see Christina Voigt, 'The Paris Agreement: What is the Standard of Conduct for Parties?' (2016) 26 QIL 17; Christina Voigt and Felipe Ferreira '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 TEL 285.

[21] Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32(2) RECIEL 237–249.

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New Zealand noted that, as a matter of statutory interpretation, the power to set GHG emissions reduction targets under s 224(2) of the country's Climate Change Reduction Act 2002 'must be interpreted consistently with New Zealand's international obligations'[22] established by the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement.

In *Urgenda*, the Hague District Court held that the plaintiff environmental organisation could not directly rely on the no-harm principle, the UNFCCC, or the Kyoto Protocol in its claim.[23] Nevertheless, the court acknowledged that international law obligations have a '"reflex effect" in national law'.[24] As such, courts in the Netherlands will consider these obligations 'when applying and interpreting national-law open standards and concepts',[25] such as social proprietary, reasonableness and propriety, the general interest, or certain legal principles. On appeal, the Dutch Supreme Court similarly applied the 'common ground' method articulated by the European Court of Human Rights in *Demir and Baykara v Turkey* to ascertain the State's positive obligations under Articles 2 and 8 of the ECHR.[26] The Dutch Supreme Court held that 'an interpretation of the ECHR must also take into account the relevant rules of international law referred to in Article 31(3)(c) of the Vienna Convention on the Law of Treaties'.[27] Under the common ground method, the Court also considered scientific insights and soft law.[28]

The Hague District Court, moreover, has indirectly relied on international law within the context of a corporation's duty of care to mitigate climate change. In the landmark *Milieudefensie v Royal Dutch Shell (RDS)* case,[29] which marked the first time that a climate mitigation duty was imposed on a corporate actor, the court considered in the context of the duty of care 'what is needed to prevent dangerous climate change' under the Paris Agreement.[30] It explained that although certain provisions of the Paris Agreement are non-binding on the private actor (in this case RDS), they nevertheless 'represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change'.[31] The court followed this reasoning in its interpretation of the 'unwritten' duty of care in this case, as Book 6, Section 162 of the Dutch Civil Code prohibits acts or omissions

[22] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733 (High Court) (*Thomson*).
[23] *Urgenda District Court* (n 2).
[24] ibid [4.4.3].
[25] ibid.
[26] *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) (*Urgenda Supreme Court*) [5.4.2].
[27] ibid.
[28] ibid [5.4.3], [7.2.11].
[29] *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL: RBDHA:2021:5339 (District Court of the Hague) [5.3].
[30] ibid [4.4.27].
[31] ibid.

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that conflict with 'proper social conduct'.[32] Accordingly, the court ordered RDS to reduce the Scope 1, 2, and 3 emissions[33] of the Shell group by net 45 per cent by 2030 relative to 2019 levels.[34]

France's *Conseil d'État* (Council of State), the highest administrative court in the country, has also indirectly relied on the Paris Agreement as well as the UNFCCC. In *Commune de Grande-Synthe v France*,[35] the Grande-Synthe municipality, a low-lying coastal area that is particularly susceptible to global warming, sought a court order in January 2019 that would force the government to implement climate measures and prohibit actions likely to increase GHG emissions.[36] The court held in November 2020 that it could not issue a ruling on the merits of the dispute. France was instead given three months to prove that it could meet its emission reduction target of 40 per cent by 2030 compared to 1990 levels without additional measures.[37] Although the plaintiffs could not directly invoke the Paris Agreement or the UNFCCC, the court acknowledged that 'they must nevertheless be taken into consideration in the interpretation of provisions of national law'.[38]

Beyond treaty law, courts have drawn on a broad range of international law norms in climate cases to give meaning and content to the duty of care, including general principles of international environmental law and international human rights law. In *PSB*, Brazil's Federal Supreme Court drew a direct connection between these norms in holding that the Paris Agreement is a human rights treaty because '[t]reaties on environmental law are a species of the genus human rights treaties'.[39] As such, the climate treaty enjoys supranational status under the constitution and 'there is no legally valid option of simply omitting to combat climate change'[40] in the country. Similarly, in *Urgenda*, the Dutch Supreme Court referred to the UNFCCC, the ECHR, Conference of the Parties (COP) decisions, the precautionary principle, the principle of due diligence, the no-harm principle, the law of state responsibility, and the notion of intergenerational equity.[41]

[32] Burgerlijk Wetboek book 6, s 162 (Netherlands).

[33] Scope 1 emissions are direct GHG emissions from sources owned or controlled by the reporting entity. Scope 2 emissions are indirect GHG emissions associated with the production of electricity, heat, or steam purchased by the reporting entity. Scope 3 emissions are all other indirect emissions, such as those emissions associated with the extraction and production of purchased materials, fuels, and services. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change* 1260 <www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_full.pdf> accessed 9 February 2024.

[34] *Milieudefensie* (n 29) [5.3].

[35] *Commune de Grande-Synthe v France* [2020] N°427301 (Conseil d'Etat).

[36] ibid [1].

[37] ibid [6].

[38] ibid [12].

[39] *PSB* (n 9) [17].

[40] ibid.

[41] *Urgenda Supreme Court* (n 26).

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9.2.1.2 IPCC and Other Forms of best Available Science

Courts have relied on the reports from the IPCC when examining the scope or standard of the duty of care of a State or a corporation. These scientific findings provide best scientific assessments of the current and projected impacts of climate change, as well as the emissions reductions that are required to prevent climate change. For example, *Thomson* shows how the work of the IPCC has provided helpful guidelines for interpreting national commitments:

> The IPCC reports provide the most up to date scientific consensus on climate change. New Zealand accepts this. To give effect to the Act and what New Zealand has accepted, recognised and committed to under the international instruments, and in light of the threat that climate change presents to humankind and the environment, I consider the publishing of a new IPCC report requires the Minister to consider whether a target set under s 224 should be reviewed. That is, it is a mandatory relevant consideration in whether an existing target should be reviewed under s 224(2).[42]

Other climate cases that cite these reports include *Urgenda*,[43] *Neubauer*,[44] *Klimaatzaak*,[45] *In re Greenpeace Southeast Asia*,[46] *Klimatická žaloba ČR*,[47] *Mathur*,[48] *Notre Affaire à Tous*,[49] *Milieudefensie*,[50] and *Future Generations*.[51]

Courts have also drawn on reports from national science institutions. In particular, the German Constitutional Court referred to evidence from the German Advisory Council on the Environment throughout its decision in *Neubauer*. In *Notre Affaire à Tous*, the Administrative Court of Paris drew from the findings of the High Council for the Climate and the Centre Interprofessionnel Technique d'études de la Pollution, an independent national scientific body and a State operator, respectively, to determine that France 'substantially exceeded its first carbon budget'.[52] Finally, the Irish Supreme Court in *Friends of the Irish Environment v Ireland* expressly gave 'significant weight'[53] to the views of the domestic Climate Change Advisory Council before quashing the government's National Mitigation Plan.

[42] *Thomson* (n 22) [94].
[43] *Urgenda Supreme Court* (n 26).
[44] *Neubauer* (n 6).
[45] *VZW Klimaatzaak Appeal* (n 3).
[46] *Greenpeace* (n 11).
[47] *Klimatická žaloba ČR* (n 10).
[48] *Mathur Strikeout* (n 12).
[49] *Notre Affaire à Tous* (n 4) [16].
[50] *Milieudefensie* (n 29).
[51] *Demanda Futuras Generaciones* (n 7).
[52] *Notre Affaire à Tous* (n 4) [30].
[53] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] Appeal no 205/19 (Supreme Court of Ireland).

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The growing sophistication of climate change science will likely present courts with novel opportunities to interpret State duty of care responsibilities and add to existing jurisprudence in the future. As plaintiffs articulate the impact that individual States and private actors have on global warming with greater particularity, it will be easier to determine if a defendant's action or inaction violated an affirmative climate duty. Courts will continue to play an essential role in determining the contours of those duties in accordance with new scientific advancements.

9.2.2 *Minimum Standard*

Courts have tended to focus on whether States have met the minimum standard of care in light of the risk of climate harm when assessing the scope of States' duty of care. In *Urgenda*, the Dutch Supreme Court issued a binding order requiring the Netherlands to set the minimum reduction level at 25 per cent by 2020 against 1990 levels, which could 'be regarded as an absolute minimum'.[54] In *VZW Klimaatzaak*, the Court of Appeal of Brussels ordered Belgium and two of its regional governments via an injunction to reduce their emissions by 55 per cent by 2030 against 1990 levels.[55] In *Neubauer*, the German Constitutional Court noted that a violation of a duty of protection occurs 'if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal'.[56] This reflects the reasoning in the *German Family Farmers* case, in which the Administrative Court of Berlin considered whether the government's emissions reduction target violated 'the constitutionally required minimum level of climate protection, even if it is a global problem'.[57]

9.2.3 *Soft Law*

Soft law has increasingly helped courts conduct its duty of care analyses for State and non-State actors. In *Urgenda*, for example, the Supreme Court referred to numerous non-binding COP decisions as evidence of 'a high degree of consensus in the international community'[58] on the need for developed countries to reduce their GHG emissions by 25–40 per cent by 2020 compared to 1990 levels.[59] In *Milieudefensie*, soft law instruments, like the UN Guiding Principles on Business and Human Rights (UNGP), OECD Guidelines for Multinational Enterprises, and the UN Global

[54] *Urgenda Supreme Court* (n 26) [7.5.1].
[55] *VZW Klimaatzaak Appeal* (n 3).
[56] *Neubauer* (n 6) [152].
[57] *Family Farmers and Greenpeace v Germany* [2018] 00271/17/R/SP (Administrative Court of Berlin).
[58] *Urgenda Supreme Court* (n 26) [7.2.7].
[59] ibid [7.2.1]–[7.2.3].

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Compact, were particularly instructive. Even though RDS endorsed the UNGP on its website, the court noted that such explicit support is actually 'irrelevant' given the 'authoritative' and 'universally endorsed content' of the instrument, as well as the European Commission's expectation that all European businesses adhere to the document's human rights guidance.[60] As a result, the court upheld the UNGP's suitability 'as a guideline in the interpretation of the unwritten standard of care'[61] under Dutch law. Such decisions reinforce the notion that, despite its non-binding nature, soft law has an essential role to play in establishing climate obligations.

9.2.4 *Defences*

One prominent argument that climate respondents make is that 'the GHG emissions from a particular activity are but a "drop in the ocean" in global terms and hence cannot be said to cause climate change harm'.[62] This defence stems in part from the 'single-entity focus of traditional regulatory and governance approaches'[63] and 'denies the complex nature of the climate change problem as one that arises because of the *cumulative* effect over time and space of numerous emissions of GHGs from a range of sources'.[64]

Courts have nevertheless upheld a State's duty to mitigate climate change despite its global nature and the fact that no one action can solve the issue. In *Massachusetts v Environmental Protection Agency (EPA)*, one of the earliest climate cases, the EPA argued that its decision not to regulate GHG emissions was because they contribute 'so insignificantly to petitioners' injuries that the Agency cannot be hauled into a federal court to answer for them.[65] The Supreme Court of the United States, however, held that the EPA has the statutory responsibility under the Clean Air Act to regulate emissions as an 'air pollutant', reasoning that agencies 'do not generally resolve massive problems in one fell swoop, but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed'.[66]

Courts have continued to disregard the 'drop in the ocean' defence in recent climate cases. *Thomson*, for example, observes that the subject of climate change is not a '"no-go area" for courts around the world, even if the 'problem is a global one and one country's efforts alone cannot prevent harm to that country's people and their environment'.[67] In *Urgenda*, the Dutch Supreme Court held that the State is

[60] *Milieudefensie* (n 29) [4.4.11].
[61] ibid.
[62] Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 5 CCLR 15, 16.
[63] ibid.
[64] ibid.
[65] *Massachusetts v EPA* 549 US 497, 517 (2007).
[66] ibid 524.
[67] *Thomson* (n 22) [133].

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'obliged to do "its part" in order to prevent dangerous climate change, even if it is a global problem'.[68] The Brussels Court of First Instance expressly agreed with this holding in *VZW Klimaatzaak*, pointing out that the 'global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their pre-described obligation under Articles 2 and 8 of the ECHR'.[69] Finally, *Neubauer* emphasises the importance of trust and cooperation between nations in the fight against climate change:

> [T]he particular reliance on the international community gives rise to a constitutional necessity to actually implement one's own climate action measures at the national level – in international agreement wherever possible. It is precisely because the state is dependent on international cooperation in order to effectively carry out its obligation to take climate action under Article 20A GG that it must avoid creating incentives for other states to undermine this cooperation. Its own activities should serve to strengthen international confidence in the fact that climate action – particularly the pursuit of treaty-based climate targets – can be successful while safeguarding decent living conditions, including in terms of fundamental freedoms. In practice, resolving the global climate problem is thus largely dependent on the existence of mutual trust that others will also strive to achieve the targets.[70]

Defendants in climate litigation have also argued that finding a duty of care could open the floodgates of litigation. As a result, some courts have hesitated to recognise novel duties of care in the climate context. For instance, in *Michael John Smith v Fonterra Co-Operative Group Limited*, a tort-based lawsuit in New Zealand, the country's High Court acknowledged that common law 'is capable of creating new principles and causes of action',[71] but establishing these duties involves clearing 'significant hurdles'[72] and matters of public policy, such as the potential for creating 'issues of indeterminate liability':[73]

> [I]t is unlikely that the class could be limited to the owners of coastal property. The claimed duty would be owed to anybody who can claim damage as a result of the widespread effects of climate change. In a very real sense, everyone is a polluter, and therefore a tortfeasor, and everyone is a victim and therefore a potential claimant. If a duty of the kind alleged were recognised, every New Zealander would be liable to suit from every other New Zealander.[74]

[68] *Urgenda Supreme Court* (n 26) [5.7.1].
[69] *VZW Klimaatzaak First Instance* (n 3) [61]. The Court of Appeal of Belgium echoed this sentiment, asserting that 'the fact that the measures adopted by the respondent parties would not suffice, taken in isolation, to prevent dangerous global warming, cannot relieve them of their positive obligations'. *VZW Klimaatzaak Appeal* (n 3) [160].
[70] *Neubauer* (n 6) [202].
[71] *Michael John Smith v Fonterra Co-Operative Group Limited and Others* CIV-2019-404-001730 [2020] NZHC 419 (*Smith High Court*).
[72] ibid [102].
[73] ibid [98(b)].
[74] ibid.

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The Court of Appeal agreed with this rationale, noting that the recognition of a novel climate duty 'would create a limitless class of potential plaintiffs as well as a limitless class of potential defendants'.[75] Defendants, as a result, 'would be subjected to indeterminate liability and embroiled in highly problematic and complex contribution arguments on an unprecedented scale potentially involving overseas emitters as well as New Zealand emitters'.[76] However, the Supreme Court of New Zealand has since overturned the Court of Appeal's decision and will allow all three claims to proceed to trial.[77] In so doing, the Supreme Court countered the notion that novel climate duties would result in a deluge of lawsuits. Rather, a defendant's actions or omissions 'must amount to a substantial and unreasonable interference with public rights'.[78] This limitation 'creates a significant threshold for plaintiffs' and '[o]nly some emitters will cross it'.[79]

In *Milieudefensie*, RDS raised a similar floodgates defence, asserting that '[e]very person creates significant greenhouse gas emissions'[80] in their daily lives, including the 'countless'[81] people who drive cars on a daily basis and the millions of Dutch people who fly each year.[82] As such, if the court were to impose a duty of care on RDS, that 'would have the undesirable result of opening the door to claims, "from all, against all"'.[83] However, as the next section will discuss, this argument was dismissed because there was 'no room for weighted interests'.[84]

9.3 EMERGING BEST PRACTICES

As climate jurisprudence continues to evolve with respect to duty of care obligations, a range of emerging best practices have developed in courts around the world. This section examines several representative best practices with an eye towards informing judges of complex issues that commonly arise in climate litigation.

9.3.1 *Hybrid Duty of Care Arguments*

The hybrid nature of climate litigation is perhaps best represented by the landmark *Urgenda* case. As has been pointed out, human rights arguments were 'technically

[75] *Michael John Smith v Fonterra Co-Operative Group Limited and Others* CA 128/2020 [2021] NZCA 552 (*Smith Court of Appeal*).
[76] ibid.
[77] *Michael John Smith v Fonterra Co-Operative Group Limited and Others* [2024] NZSC 5 (*Smith Supreme Court*).
[78] ibid [168].
[79] ibid.
[80] *Milieudefensie* (n 29) (Statement of Defense) [485].
[81] ibid.
[82] ibid.
[83] ibid [463].
[84] *Milieudefensie* (n 29) [4.5.3].

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peripheral to grounds of the case',[85] which centred around the Dutch Civil Code, but 'they ended up being decisive to the result as they were utilised by the court to fill in the content of due diligence standards owed under the duty of care considered by the court'.[86] Accordingly, *Urgenda* is a 'progressive example'[87] of how courts can 'actively use the substantive and procedural provisions of international human rights law, together with soft law provisions such as targets agreed under the Paris framework, to interpret domestic law, and to bridge the gap between the international law obligations of the state concerned and its domestic law'.[88]

In *Urgenda*, the Dutch Supreme Court affirmed a District Court order that the Netherlands has a duty of care to reduce its GHG emissions by at least 25 per cent by 2020 compared to 1990 levels.[89] This responsibility stems from the unwritten rule pursuant to the aforementioned Book 6, Section 162 of the Dutch Civil Code, which prohibits acts or omissions that conflict with 'proper social conduct',[90] as well as Articles 2 and 8 of the ECHR, which protect the right to life and the right to respect for private and family life, respectively. When analysing potential violations of this tort provision before *Urgenda*, judges in the Netherlands considered 'general social notions of what may be expected from a legal person acting reasonably'.[91] In this case, the court held that the Netherlands has a duty under Articles 2 and 8 of the ECHR to 'take appropriate steps'[92] to address the 'real and immediate risk'[93] of climate change.

Urgenda represents an emerging best practice in part because of its forward-looking assessment of climate change impacts and its willingness to frame the State's duties around the uncertainty of that crisis. For example, the court emphasised that the Netherlands has a responsibility to take climate action even if the impacts of climate change will not materialise for decades or impact specific persons.[94] Similarly, the fact that there is uncertainty surrounding the potential materialisation of climate change impacts in the future does not relieve the State of its duty of care in the present.[95] Rather, the 'sufficiently genuine possibility'[96] of this risk materialising

[85] Kumaravadivel Guruparan and Harriet Moynihan, 'Climate Change and Human Rights-Based Strategic Litigation' (*Chatham House*, November 2021) www.chathamhouse.org/2021/11/climate-change-and-human-rights-based-strategic-litigation/introduction> accessed 27 February 2024.
[86] ibid.
[87] ibid.
[88] ibid.
[89] *Urgenda Supreme Court* (n 26) [9].
[90] Burgerlijk Wetboek book 6, s 162 (Netherlands).
[91] *Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands* (International Commission of Jurists 2013).
[92] *Urgenda Supreme Court* (n 26) [5.3.2].
[93] ibid [5.6.2].
[94] ibid.
[95] ibid [5.3.2].
[96] ibid [5.6.2].

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requires 'that suitable measures'[97] be taken. Although the Netherlands still has 'discretion in choosing the steps to be taken',[98] they need to be 'reasonable and suitable'[99] given the seriousness of climate change.

9.3.2 *Duty of Care Derived from Constitutional Rights*

The German Federal Constitutional Court's analysis in *Neubauer* represents emerging best practice in relation to how far-reaching climate obligations can be derived from constitutional provisions. The case was brought by a large group of youth plaintiffs from Germany, Nepal, and Bangladesh, who argued that Germany's Federal Climate Protection Act (Klimaschutzgesetz – KSG) violated several of their fundamental rights contained in the Basic Law (constitution).[100] The KSG sets a climate neutrality ('net-zero emission') target for 2050. Although KSG specified annual GHG emissions allowed up to 2030, emissions reductions for the post-2030 period needed for reaching climate neutrality in 2050 were undetermined. The court held that this ambiguity and its potential for immense reduction burdens after 2030 unconstitutionally jeopardised the future freedoms of the young plaintiffs.[101]

Under Articles 2(2) and 14(1) of the Basic Law, Germany must safeguard freedom rights and the fundamental right to life and physical integrity,[102] as well as property, respectively.[103] The court notably determined that both these duties encompass climate obligations. For example, Article 2(2) places an obligation on Germany to protect the life and health of current and future generations from the 'considerable risks'[104] brought on by 'increasingly severe climate change',[105] such as heat waves, flooding, and hurricanes. The State, accordingly, has a duty to engage in international treaty negotiations, establish national mitigation measures, and implement adaptation strategies to protect current and future generations from the effects of climate change.[106] Similarly, unmitigated climate change will cause houses and entire settlements in Germany to become uninhabitable due to flooding and rising sea levels.[107] The court reasoned that because the loss of property might 'be accompanied by a loss of stable community ties within the

[97] ibid.
[98] ibid [5.3.2].
[99] ibid. The Court of Appeal of Belgium similarly found that the State breached its duty to take climate action based on Articles 2 and 8 of the ECHR and Articles 1382 and 1383 of the Belgian Civil Code. *VZW Klimaatzaak Appeal* (n 3).
[100] *Neubauer* (n 6).
[101] ibid [266].
[102] ibid [99].
[103] ibid [171].
[104] ibid [148].
[105] ibid.
[106] ibid [148]–[150].
[107] ibid.

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local environment',[108] these ties must be taken into consideration under Article 14(1) GG, which grants 'a certain degree of protection to social environments that have matured to the point of being "communities"'.[109] The court found a violation of the claimants' freedom rights because of the discriminatory allocation of climate measures after 2030.[110] Those measures infringed upon the freedom rights of the young claimants by locking them into a carbon-intensive future that would inevitably require burdensome mitigation measures.

Another example of this dynamic can be found in *In re Court on its own motion v State of Himachal Pradesh*, in which India's National Green Tribunal (NGT) mandated that all visitors to Rohtang Pass – a popular tourist destination in the Himalayas – must pay a tax that addresses the presence of black carbon in the area and the 'need to tackle global warming'.[111] The holding in this case stems from several constitutional Articles that do not mention global warming, but which the NGT interpreted 'in a way that compels governments to support and encourage more effective climate change adaption efforts'.[112] For instance, Article 21 of the country's constitution protects the right to life and personal liberty, which the Supreme Court of India has liberally interpreted to encompass the right to a healthy environment.[113] Article 48A, similarly, places an obligation on the State 'to protect and improve the environment and to safeguard the forest and wildlife in the country'.[114]

State of Himachal Pradesh is thus rooted in rights that the court interpreted as 'being compromised by a combination of changing environmental circumstances and government inaction'.[115] Accordingly, Articles 21 and 48A provide the primary legal basis for Himachal Pradesh's duty to 'ensure due protection to the forests and environment of the country'.[116] To fulfil this duty, the tribunal held that the government must implement policy that weighs 'the need for development of industry, irrigation resources, power projects'[117] as well as the sanctity of life, public health,

[108] ibid.
[109] ibid.
[110] ibid [266].
[111] *Court on its own Motion v State of Himachal Pradesh and Ors* Application No 237 (THC)/ 2013 (CWPIL No 15 of 2010) *(State of Himachal Pradesh)* [31], [38]. 'Black carbon, or unburned fuel from vehicles, is a "major causative factor for rapid melting of glacier[s] in the Himalayan region" and a significant contributor to global warming.' ibid [3].
[112] 'The Status of Climate Change Litigation: A Global Review' (*UNEP*, 2017) <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y> accessed 9 February 2024.
[113] *State of Himachal Pradesh* (n 111) [13].
[114] ibid [11], [20]. The Tribunal also noted that art 51A of the constitution requires citizens to protect and improve the natural environment. As such, 'even the citizens must realize their responsibility towards restoring the degraded environment of one of the most beautiful zones of the country as well as preventing further damage'.
[115] ibid.
[116] ibid [14].
[117] ibid [17].

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and ecology.[118] These considerations form a '"reasonable person's" test'[119] involving both factors, with environmental protection ultimately having priority over unemployment and loss of revenue.[120] Himachal Pradesh's failure to properly restrict development in Rohtang Pass thereby violated its duty of care and prompted the tribunal to issue the visitor tax.

In the United States, the Due Process Clause of the country's constitution does not normally impose an obligation on the government to act, even if such action is necessary to prevent the loss of life, liberty, or property.[121] However, an exception applies when government conduct places a person in peril in deliberate indifference to their safety.[122] This 'danger creation' allows plaintiffs to bring forward a substantive due process claim, which the twenty-one youth plaintiffs in *Juliana v United States* invoked against the national government in Oregon's district court.

The *Juliana* plaintiffs contended that the government 'played a unique and central role'[123] in the creation of global warming and 'contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change'.[124] As a result of these actions, the Due Process Clause allegedly 'imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions'.[125] At the motion to dismiss stage, the court accepted the allegations as true and allowed the substantive due process challenge to proceed.[126]

The district court again considered the danger creation exception claim on motion for summary judgment,[127] with the plaintiffs presenting extensive evidence dating back to the 1960s that demonstrated a question of material fact regarding the government's 'knowledge, actions, and alleged deliberate indifference'[128] to climate change. The court acknowledged the 'complicated and novel questions about standing, historical context, and constitutional rights'[129] and denied the defendants' motion for summary judgment. This provided an opportunity for the plaintiffs to cultivate 'the most exhaustive record possible during a trial'[130] with an understanding that there was still a 'very high bar to ultimately succeed'.[131] The Ninth Circuit ultimately dismissed the plaintiffs' case for lack of standing without examining the

[118] ibid.
[119] ibid [12].
[120] ibid.
[121] *Juliana v United States* 217 F.Supp.3d 1224, 1260 (District Court of Oregon 2016).
[122] ibid.
[123] ibid.
[124] ibid.
[125] ibid.
[126] ibid.
[127] *Juliana v United States* 339 F. Supp. 3d 1062 (District Court of Oregon 2018).
[128] ibid 1099–1101.
[129] ibid 1101.
[130] ibid.
[131] ibid.

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danger creation argument. However, the *Juliana* plaintiffs' efforts to distinguish an affirmative State duty presents an intriguing approach to climate mitigation responsibility in the United States, and the Oregon district court's willingness to allow the plaintiffs to develop a comprehensive record can be regarded as an emerging best practice for substantive due process claims in climate litigation.

9.3.3 *Future Emissions Targets and Future Generations*

In recent years, climate change activists, environmental organisations, and the general public have spearheaded strategic litigation aimed at the sufficiency of national climate policies.[132] This trend will likely continue with plaintiffs relying on courts to scrutinise the NDCs that countries must produce every five years under the Paris Agreement. As such, the Paris Administrative Court's recognition in *Notre Affaire à Tous* that a State cannot escape its immediate duty of care obligations by potentially meeting future emissions targets is reflective of emerging best practice.

The four plaintiff environmental organisations in *Notre Affaire à Tous* argued that France has a general duty to fight climate change based on, *inter alia*, the UNFCCC, the Paris Agreement, Articles 2 and 8 of the ECHR, and its domestic law.[133] They posited that France violated this duty by not adopting 'sufficient measures to ensure the application of the legislative and regulatory framework it has set itself to combat climate change'[134] and failing to set 'targets for the reduction of greenhouse gas emissions which do not allow the rise in the global average temperature of the atmosphere to be limited to 1.5°C'.[135] Over 2.3 million citizens signed a petition submitted with the court filings, which represents the greatest level of public support for a climate case at the time of this writing.[136]

The court highlighted how France's international and domestic commitments recognise 'the existence of an "emergency" to combat the ongoing climate change'[137] as well as 'its capacity to act effectively on this phenomenon in order to limit its causes and mitigate its harmful consequences'.[138] The country's corresponding actions include its treaty-based climate obligations to the international community and a domestic 'public policy to reduce greenhouse gas emissions … by specific and successive deadlines'.[139] France thereby accepted a duty of care to take reasonable

[132] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot' (*LSE Grantham Research Institute on Climate Change and the Environment*, July 2021) 10 <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf> accessed 24 February 2024.
[133] *Notre Affaire à Tous* (n 4) [4].
[134] ibid [17].
[135] ibid.
[136] Setzer and Higham (n 132) 16.
[137] *Notre Affaire à Tous* (n 4) [21].
[138] ibid.
[139] ibid.

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political steps and address climate change. However, when the country substantially exceeded its first carbon budget, which took place during 2015 to 2018, it 'failed to carry out the actions that it had itself recognized as likely to reduce greenhouse gas emissions'.[140] Notably, the court held that France's potential to reach its national targets and reduce GHG emissions by 40 per cent in 2030 compared with 1990 levels as well as achieve carbon neutrality by 2050 'does not exonerate it from its liability'.[141] This is because France's climate mitigation missteps have resulted in additional emissions that will aggravate existing ecological damage over their lifetime in the atmosphere.[142]

In addition to *Notre Affaire à Tous*, *Neubauer* can also help judges examine a State's comprehensive climate mitigation plans and evaluate periodic implementation efforts with an eye towards intergenerational equity. In *Neubauer*, the court found that Article 20(a) of the Basic Law, which requires Germany to protect the natural foundations of life for future generations, also establishes an affirmative obligation to take climate action with the aim of achieving climate neutrality.[143] Due to the global nature of climate change, Article 20(a) 'thus contains a duty that necessarily looks beyond the domestic legal system under the sole responsibility of the individual state, and must be understood as also pointing towards the level of international activity'.[144] This obligation to act goes beyond the pursuit of climate treaties and 'extends to the implementation of agreed solutions'.[145] The court interpreted Article 20(a) in light of the goals of the Paris Agreement, and stated that 20(a) required net-zero emissions by 2050. This requirement was implemented into the KSG and thereby legally binding, but not with the needed specificity of mitigation measures for 2031–2050.

As Article 20(a) is uniquely concerned with 'how environmental burdens are spread out between different generations',[146] Germany's duty of care involves 'treat[ing] the natural foundations of life with such care … that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence'.[147] Translated to the climate context, it is imperative that the State 'prevent[s] an overly short-sighted and thus one-sided distribution of freedom and reduction burdens to the detriment of the future'.[148] The court held that the emissions allowed before 2030 'are capable of giving rise to substantial burdens to reduce emissions'[149] beyond that time period, which creates

[140] ibid [30].
[141] ibid [31].
[142] ibid.
[143] *Neubauer* (n 6) [197]–[198].
[144] ibid [200].
[145] ibid.
[146] ibid [193].
[147] ibid.
[148] ibid [194].
[149] ibid [142].

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a significant risk of impairment to fundamental rights.[150] Germany thereby violated its duty to ensure that the reduction of GHG emissions is 'spread out over time in a forward-looking'[151] and proportional manner that respects the rights of those that are young today in the future in an 'intertemporal' extension of their rights. As young plaintiffs will likely continue to rely on courts to hold States accountable for their climate actions on behalf of future generations, *Neubauer* provides insight into how courts can evaluate the long-term ambition and impacts of national climate policies.

9.3.4 *Duty of Care for Corporations*

The Hague District Court's historic ruling in *Milieudefensie* against RDS represents an emerging best practice for how courts should apply duty of care obligations to private actors. As mentioned earlier, by holding that RDS must reduce the Scope 1, 2, and 3 emissions of the global Shell group by net 45 per cent by 2030 relative to 2019 levels, the case marked the first time that a court ordered a corporation to adopt climate policies that are aligned with the Paris Agreement.[152] As such, it provides a potential template for judges who must consider the legal responsibility that corporate defendants have for their GHG emissions.

The main legal issue in *Milieudefensie* was whether RDS owed a duty of care to mitigate climate change based on the same unwritten notion in the Dutch Civil Code from *Urgenda*. The court ultimately sided with the plaintiffs and held that RDS has a duty to take climate action because Book 6, Section 162 of the Dutch Civil Code implies an obligation not to act in conflict with what is generally regarded as proper social conduct according to unwritten law.[153] Interpreting the nuances of this duty called 'for an assessment of all circumstances of the case in question',[154] including international law, soft law, the company's own policies, and the best available science.

Although the plaintiffs could not directly invoke the Paris Agreement and human rights established in the relationship between states and citizens – in this case, Articles 2 and 8 of the ECHR and Articles 6 and 17 of the International Covenant on Civil and Political Rights – the court nevertheless acknowledged that those rights 'may play a role in the relationship'[155] between the plaintiffs and RDS due to the fundamental interest of human rights and the value for society they embody as a

[150] ibid [245].
[151] ibid [243].
[152] Daniel Boffey, 'Court Orders Royal Dutch Shell to Cut Carbon Emissions by 45% by 2030' (*The Guardian*, 26 May 2021) <www.theguardian.com/business/2021/may/26/court-orders-royal-dutch-shell-to-cut-carbon-emissions-by-45-by-2030> accessed 26 February 2024.
[153] *Milieudefensie* (n 29) [4.4.1].
[154] ibid.
[155] ibid [4.4.9].

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whole. It thus factored in human rights and the values they embody in its interpretation of the unwritten standard of care: 'From the Urgenda ruling it can be deduced that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to CO_2 emissions induced global warming'.[156] The court concluded that 'RDS' argument that the human rights invoked by Milieudefensie et al. offer no protection against dangerous climate change therefore does not hold. The serious and irreversible consequences of dangerous climate change in the Netherlands and the Wadden region … pose a threat to the human rights of [the claimants]'.[157]

The court also relied on the 'universally endorsed'[158] – although non-binding – UNGP to distinguish the different responsibilities that States and businesses have in the protection of human rights. The obligation of States under international human rights law is binding and requires them to 'prevent, investigate, punish and redress' human rights abuses in their territory through 'effective policies, legislation, regulations and adjudication'.[159] However, corporations must also 'avoid infringing on the human rights of others' and take proactive steps 'to prevent, limit and, where necessary, address' such abuses.[160] This duty exists independently of States' abilities to meet their human rights obligations and 'applies everywhere, regardless of the local legal context'.[161] As part of its duty of care, RDS thus has a responsibility to respect human rights across its entire value chain,[162] from the business relations of the Shell group, which it has a policy-setting influence over as the top holding company, to the emissions of its end-users.[163]

To ascertain what is needed from RDS to reduce GHG emissions, the Paris Agreement provided crucial guidance. The treaty, according to the court, 'is supported by widespread international consensus'[164] and 'represent[s] the best available scientific findings in climate science'.[165] Those findings indicate that limiting global warming to 1.5°C will require reduction pathways aiming for net 45 per cent by 2030, relative to 2010 levels, and net 100 per cent by 2050.[166] Although the instrument does not bind private actors such as RDS,[167] there is 'broad international consensus that each company must independently work towards

[156] *Miljeudefensie* (n 29) [4.4.10].
[157] ibid.
[158] ibid [4.4.11].
[159] ibid [4.4.12].
[160] ibid [4.4.15].
[161] ibid.
[162] ibid [4.4.17].
[163] ibid [4.4.18], noting that 'business relations' includes places where the Shell group 'purchases raw materials, electricity and heat'.
[164] ibid.
[165] ibid [4.4.27].
[166] ibid [4.4.29].
[167] ibid [4.4.26].

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achieving net zero emissions by 2050"[168] and, similar to the *Urgenda* decision, 'RDS may be expected to do its part'.[169]

In specifying RDS's duty of care, the court set an obligation of result and a 'significant best-efforts obligation'.[170] The company's responsibility to lower the CO_2 emissions of the Shell group by net 45 per cent relative to 2019 levels is an obligation of result. RDS, however, has leeway to differentiate the respective reductions in Scope 1, 2, and 3 emissions, as long as it achieves the overall target reduction amount.[171] This rationale is consistent with *Urgenda's* willingness to grant the Netherlands discretion in the steps taken to meet its emissions target.[172]

On the other hand, RDS's best-efforts obligation concerns the business relations of the Shell group, including the Scope 3 emissions of its end-users. The court declared that RDS may need to take 'necessary steps' to prevent the serious risks from their CO_2 emissions, and to 'use its influence to limit any lasting consequences as much as possible'.[173] It is unclear how RDS should go about exerting this pressure on its value chain, but a possible consequence could be that the company 'forgo[es] new investments in the extraction of fossil fuels' or 'limit[s] its production of fossil resources'.[174] Future jurisprudence will thus be crucial to addressing this gap in climate litigation with respect to corporations.

9.3.5 *Environmental Impact Assessments*

As mentioned earlier, one of the difficulties of climate litigation is that the single-entity regulatory focus of governments often overlooks the complex, cumulative nature of climate change. However, international law maintains that projects with the potential for significant transboundary harm must go through the Environmental Impact Assessment (EIA) process. This procedural requirement is supported by International Law Commission scholarship[175] and International Court of Justice case law, particularly *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (*Pulp*

[168] ibid [4.4.36].

[169] ibid [4.4.26]. The court chose not to discuss whether RDS qualifies as a 'non-Party stakeholder' to the Paris Agreement as discussed at the 25th Conference of the Parties to the UNFCCC in Madrid. Instead, it noted that 'the reduction of CO_2 emissions and global warming cannot be achieved by states alone' and 'there has been broad international consensus about the need for non-state action'.

[170] ibid [4.4.55].

[171] ibid [4.4.38]–[4.4.39]. Per the plaintiffs' claims, the court set 2019 as the base year, instead of 2010, because that was the year the summons was issued.

[172] *Urgenda Supreme Court* (n 26) [5.3.2].

[173] *Milieudefensie* (n 29) [4.4.39].

[174] ibid.

[175] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/RES/56/83 (2001), 53 UN GAOR Supp (No 10) at 43, Supp (No 10) A/56/10 (IV.E.1) 154.

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Mills), a 2010 dispute in which the court held that States should determine EIA requirements and ensure that the assessment is conducted with due diligence before a project's commencement.[176]

Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd provides insight into the role of an EIA in climate litigation and how these international norms can play out in domestic courts.[177] Kenya adheres to international law by requiring coal plant developers to secure an EIA before construction begins on a project. This obligation is cemented in its national constitution, the Environmental Management and Coordination Act, 1999, the Environmental (Impact Assessment and Audit) Regulations, and the Energy Act, 2019.[178] Public participation is an essential part of Kenya's EIA process and, although an agency is not required 'to accept the view given as dispositive',[179] it does create 'a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received'.[180] Likewise, it is not necessary for every person to support a project or for a proponent to 'address every unreasonable demand and suggestion',[181] but 'even the most feeble of voices [must] be heard'.[182]

In *Save Lamu*, the National Environmental Tribunal revoked Amu Power Company's EIA licence for a two-billion-dollar coal facility because the National Environmental Management Authority issued it without 'proper and effective public participation'.[183] The tribunal held that the National Environmental Management Authority 'owed a duty to properly supervise and ensure there had been compliance'[184] with EIA requirements, but the agency's efforts were inadequate.[185] The fact that the public did not have information on the project's potential climate impacts before providing testimony was regarded as particularly troubling.[186] Although Amu Power's EIA was ultimately an 'impressive piece of literal work',[187] it was 'devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value'.[188]

[176] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 [205].
[177] *Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd* [2016] Tribunal Appeal No Net 196 of 2016 (Kenya Environmental Tribunal).
[178] ibid [18], observing the Energy Act 2019 (Kenya) art 107(2)(d) requires a Strategic Environment Assessment and Social Impact Assessment.
[179] ibid [25] (quoting *Mui Coal Basin Local Community and 15 others v Permanent Secretary Ministry of Energy and 17 others* [2015] eKLR (*Mui Coal Basin*) [97]).
[180] ibid.
[181] ibid [50].
[182] ibid.
[183] ibid [151].
[184] ibid [71].
[185] ibid.
[186] ibid [69].
[187] ibid [73].
[188] ibid.

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As States continue to rely on fossil fuels to meet their domestic power needs, *Save Lamu* underscores how an EIA can be a powerful procedural requirement.[189] In fact, it may be the only way for plaintiffs to successfully challenge the construction of projects with significant emissions in some jurisdictions. In Kenya, for example, 'if the requisite conditions are met with respect to environmental matters including the due and proper preparation of an EIA study … coal fired power plants remain, for the time being, a lawful option'.[190] The *Save Lamu* tribunal's willingness to uphold the normative value of those procedural conditions can thus be considered an emerging best practice.

Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others[191] can also be seen as a companion case to *Save Lamu* with respect to EIA considerations. South Africa's High Court in Pretoria determined that 'climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation'.[192] The environmental authorisation in *Earthlife* was granted by the Chief Director of the Department of Environmental Affairs to the Thabametsi Power Company Limited for a proposed 1200-megawatt coal-fired plant station in Limpopo Province.[193] Under South Africa's constitution, courts interpreting legislation 'must prefer any reasonable interpretation'[194] consistent with international law 'over any alternative interpretation that is inconsistent with international law'.[195] Thus, international agreements on climate change are relevant to the proper interpretation of the National Environmental Management Act (NEMA) that governs environmental authorisations in South Africa.[196]

[189] Other cases of note that focus on procedural failures include *WildEarth Guardians v Zinke* 368 F.Supp.3d 41 (District Court of Columbia) and *Philippi Horticultural Area Food & Farming Campaign, et al v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape, et al* [2020] High Court of South Africa (Western Cape Division) 39724/2019. In *WildEarth Guardians* [75] the United States District Court for the District of Columbia found that the Bureau of Land Management (BLM) violated the National Environmental Policy Act when it failed to take a hard look at the climate impacts from its oil and gas leases in three states. The court held that although BLM 'may determine that each lease sale individually has a de minimis impact on climate change', it 'must also consider the cumulative impact of GHG emissions generated by past, present, or reasonably foreseeable BLM lease sales in the region and nation'. In *Philippi Horticultural Area Food & Farming Campaign* [4.2.1] South Africa's High Court in Cape Town required the city to reconsider 'any report(s) which detail the impacts' of a proposed aquifer development 'in the context of climate change and water scarcity'.

[190] *Save Lamu* (n 177) [19].

[191] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 65662/16 <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2017/20170306_Case-no.-6566216_judgment-1.pdf> accessed 27 March 2023.

[192] ibid [91].

[193] ibid [1]–[2].

[194] ibid [83].

[195] ibid.

[196] ibid.

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The *Earthlife* court noted that the absence of an express provision requiring a climate change impact assessment 'does not entail that there is no legal duty to consider climate change'.[197] Rather, NEMA impliedly imposes a peremptory statutory duty on the Chief Director to 'thoroughly investigate climate change impacts'[198] with national and international consequences.

Even if new coal-fired power stations are permitted by the Paris Agreement and South Africa's NDC, a climate change impact assessment is 'necessary and relevant'[199] to the EIA process. This is because the assessment ensures that the proposed development fits South Africa's peak, plateau, and decline trajectory outlined in its NDC as well as 'its commitment to build cleaner and more efficient' coal plants.[200] Ascertaining if a climate assessment has been made involves a narrow examination of conduct: 'A formal expert report on climate change impacts will be the best evidentiary means of establishing that this relevant factor in its multifaceted dimensions was indeed considered, while the absence of one will be symptomatic of the fact that it was not'.[201] Since the Chief Director did not consider any expert climate report before granting Thabametsi an environmental authorisation, the court determined that he overlooked relevant considerations.[202]

Earthlife highlights the notion that a national environmental assessment statute can implicitly create climate mitigation duties through the EIA process. This duty affects the State agencies that oversee environmental authorisations as well as the companies carrying out EIAs for compliance purposes. *Earthlife* is therefore significant because it represents a progression from the *Save Lamu* decision and promotes a more robust standard of conduct incorporating treaty-based climate commitments and international law obligations. The case may be especially relevant to dualist systems, where judges must consider a State's responsibilities to the global community and their relationship to domestic environmental legislation.

A recent example of the importance of comprehensively evaluating climate impacts in an EIA assessment can be found in *Greenpeace Nordic and Nature & Youth v Energy Ministry*.[203] The Oslo District Court held that the Norwegian Energy Ministry's approval of three oil and gas fields in the North Sea was invalid because the EIAs did not include combustion (Scope 3) emissions data from the oil and gas produced. This failure went against the idea that EIAs 'must be objective and so comprehensive and complete' that authorities are properly aware of potential environmental harms and the public can gain 'real insight into the climate effects of

[197] ibid [88].
[198] ibid [124].
[199] ibid [90].
[200] ibid.
[201] ibid [88].
[202] ibid [101].
[203] *Greenpeace Nordic and Nature & Youth v Energy Ministry* [2024] Case no 23-099330TVI-TOSL/05 (Oslo District Court).

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the combustion emissions'.[204] This rationale is reflective of emerging best practice as it underscores the crucial role Scope 3 emissions data plays in informing both administrative decisionmakers and the public.

9.3.6 *Drop in the Ocean Defence*

As described earlier, *Massachusetts v EPA* remains notable in part for the United States Supreme Court's response to the drop in the ocean defence invoked by the EPA. The court disagreed with the agency's assertion that 'gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease'[205] from its regulation of vehicle emissions. The court reasoned that the possibility that other developing countries may increase GHG emissions in the future is irrelevant since a 'reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere'.[206] It is not only this forward-looking rationale that is reflective of emerging best practices; so, too, is the court's willingness to assert its jurisdiction by declaring that, even if 'regulating motor-vehicle emissions will not by itself *reverse* global warming',[207] it still has the ability to determine whether the EPA has the 'duty to take steps to *slow* or *reduce* it'.[208] Such boldness will likely be required of courts in the future as complex climate issues continue to arise with governments and regulatory agencies serving as defendants.

Over a decade and a half later, the line of reasoning in *Massachusetts v EPA* that countered the EPA's drop in the ocean defence continues to play a crucial role in climate cases. This is noticeably apparent in the *Urgenda* decision, in which the Dutch Supreme Court points out that the failure of other States to take climate action is not an excuse for the Netherlands to neglect its duty of care obligations.[209] Even if those countries continue to emit large amounts of pollutants, the Netherlands is still responsible for 'its part'[210] in the climate crisis, as 'no reduction [in GHG emissions] is negligible'.[211] The *Neubauer* court similarly explained that Germany 'may not evade its responsibility here by pointing to greenhouse gas emissions in other states'.[212] Instead, '[i]t's own activities should serve to strengthen

[204] ibid [98]–[99].
[205] *Massachusetts v EPA* (n 65) [524].
[206] ibid.
[207] ibid [525].
[208] ibid.
[209] *Urgenda Supreme Court* (n 26) [5.7.7].
[210] ibid [5.7.1].
[211] ibid [5.7.8]. The *VZW Klimaatzaak* court also cited this logic in reaching its holding, see *VZW Klimaatzaak First Instance* (n 3) [61] ('the global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their pre-described obligation under Articles 2 and 8 of the ECHR. In this respect, the Court agrees with the view of the Dutch Supreme Court in the *Urgenda* case').
[212] *Neubauer* (n 6) [202].

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international confidence'[213] as addressing climate change is 'largely dependent on the existence of mutual trust that others will also strive to achieve the[ir] targets'.[214] In *Klimatická žaloba ČR*, the Czech court declared that 'the individual responsibility of the States Parties to the Paris Agreement cannot be excluded by reference to the level of emission contributions of other States'[215] since this 'approach would make effective legal protection impossible where the State in question is not a significant emitter of greenhouse gases on a global scale'.[216] Accordingly, the willingness of courts to uphold individual duty of care obligations – irrespective of the comparative emissions of others – is reflective of emerging best practices in what is ultimately a collective effort against climate change.

9.3.7 *Floodgates Defence*

The Hague District Court's rejection of the floodgates defence in *Milieudefensie* reflects an emerging best practice that will become more important as duty of care jurisprudence evolves in climate litigation. The court rebutted RDS's floodgates argument by asserting that the 'policy, policy intentions and ambitions'[217] of RDS for the Shell group were 'incompatible'[218] with its reduction obligation. This incompatibility thereby 'implie[d] an imminent violation'[219] of RDS's reduction obligation and, as such, it was not necessary for the court to consider if it was appropriate to impose a climate duty on a single private party or 'whether or not this invites everyone in global society to lodge claims against each other'.[220] In future cases, courts that choose to address the merits of the floodgates defence may opt to do so through a fact-specific inquiry.[221]

[213] ibid.

[214] ibid. Note that the Court of Appeal of Belgium expressly referenced *Urgenda* and *Neubauer* in its rejection of the government's drop in the ocean defence. *VZW Klimaatzaak Appeal* (n 3) [160].

[215] *Klimatická žaloba ČR* (n 10) [325]. Note, however, that the Supreme Administrative Court of the Czech Republic overturned this decision in February 2023. *Klimatická žaloba ČR v Czech Republic* 9 As 116/2022 – 166 (Supreme Administrative Court).

[216] ibid.

[217] *Milieudefensie* (n 29) [4.5.3].

[218] ibid.

[219] ibid.

[220] ibid.

[221] In *Sharma and others v Minister for the Environment*, the Federal Court of Australia substantively dismissed the defendant's floodgates argument as a 'false premise' in ruling that the Minister for the Environment had a duty of care to children when considering a coal expansion project. See *Sharma and others v Minister for the Environment* [2021] FCA 560 (*Sharma First Instance*). According to the court, '[I]t does not follow from the recognition of a duty of care based on the relationship between the Minister and the Children that the Minister owes a duty of care to others or that anyone else involved in contributing to greenhouse gas emissions owes the same duty'. ibid [488]. As the relationship between the Minister and the Children is distinctly 'unique to them', any novel climate duties considered by the court in the future would require a unique multi-factorial assessment. Even though the decision was later overturned, the handling of the floodgates defence displays how the judiciary is well-equipped to sift through frivolous climate claims on a case-by-case basis.

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9.4 REPLICABILITY

As climate litigation cases grow in complexity and across geographic regions, there is a good probability that a more developed jurisprudence will form around State duty of care obligations. National climate change laws and policies, which have doubled roughly every four years since the adoption of the Kyoto Protocol in 1997,[222] are 'by far the most commonly cited sources of climate obligations'.[223] At the time of this writing, there are more than 2,250 such laws and policies around the world.[224] This steadily expanding stock of climate legislation will provide plaintiffs with increased flexibility to hold States and private actors accountable for their respective duties of care.

Similarly, the Paris Agreement will remain a valuable source of international law that will help courts contextualise Parties' domestic mitigation obligations within their larger commitments to the global community. The communication and implementation of Parties' NDCs, in particular, will likely be a starting point for future legal arguments centred around duties of care and the 'highest possible ambition' requirement of Article 4(3). As each NDC must represent a progression in relation to the previous one,[225] plaintiffs will have important comparative reference points.

Whether a climate case concerns substantive domestic policy or the ambition of an NDC, the emerging best practices detailed in the last section offer insight into when a duty of care violation may have occurred. In this respect, *Urgenda* may be particularly useful in situations that call for a hybrid legal strategy relying on a mix of tort, international, and domestic law. Former UN High Commissioner for Human Rights Michelle Bachelet has not only cited the importance of *Urgenda*, she has emphasised the 'even greater importance of it being swiftly replicated in other countries'.[226] Although tort law will vary by jurisdiction, the rights-based aspect of the decision should bolster its replicability, particularly in nations that are Parties to the ECHR. This dynamic can be observed in cases such as *Notre Affaire à Tous* and *Friends of the Irish Environment*.

Neubauer, on the other hand, may be more relevant when plaintiffs aim to invoke constitutional protections or the rights of future generations when challenging national climate plans. In particular, the willingness of the German Federal Constitutional Court to derive a State's duty to allocate fairly over time the burden

[222] Michal Nachmany and others, 'Global Trends in Climate Change Legislation and Litigation' (*LSE Grantham Research Institute on Climate Change and the Environment*, 2017) 8 <http://archive.ipu.org/pdf/publications/global.pdf> accessed 24 February 2024. In 1997, there were only sixty climate laws in existence.

[223] Global Climate Litigation Report 2020 (n 1) 47.

[224] 'Climate Change Laws of the World' <https://climate-laws.org/> accessed 27 February 2024.

[225] Paris Agreement (n 13) art 4(3).

[226] 'Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights from Climate Change' (*OHCHR*, 20 December 2019) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> accessed 26 February 2024.

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associated with climate action from constitutional provisions that protect certain freedom rights appears ripe for duplication.[227] This common denominator could thereby serve as the basis for future claims in the climate context with parallels made to the German Constitutional Court's interpretation of Article 2(2). Similarly, given the disastrous impacts of climate change on ecosystems, the right to a healthy environment, which is enshrined in constitutional or legislative provisions of over 150 States and recognised by the UN General Assembly and UN Human Rights Council, could also provide a legal basis for future climate litigants.[228]

Neubauer even opens the possibility that Germany and other States could have a constitutional duty to protect individuals outside its borders from climate impacts. The German Constitutional Court granted the plaintiffs living in Bangladesh and Nepal standing because impacts on those plaintiffs could not 'be ruled out from the outset'.[229] However, although such a duty is 'conceivable in principle',[230] the court declined to address it substantively since the scope of protections abroad are context-specific and not codified in the KSG.[231] One possible factor that could establish this climate duty is if 'the severe impairments already or potentially faced by the complainants due to climate change are caused to some – albeit small – extent by greenhouse gas emissions emanating from Germany'.[232] This obligation would be limited by the difficulty of implementing adaptation measures in other countries[233] and, therefore, Germany's theoretical duty to residents abroad would 'not have the same content'[234] as its domestic equivalent. Nevertheless, the court's willingness to consider the possibility of a climate duty to individuals outside its borders lays an intriguing foundation for future claims in Germany and beyond.

Another emerging best practice that appears to be ripe for replication is the *Milieudefensie* court's reasoning in imposing a climate duty on a corporate actor. It has been argued that it 'is hard to overstate the consequences of a decision that is already being hailed as a turning point for big oil'.[235] Accordingly, 'the replicability of the arguments and the international standards and common facts that comprise'

[227] John Sprankling, 'The Global Right to Property' (2014) 52 Columbia Journal of Transnational Law 464, 491.

[228] OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2019) UN Doc A/HRC/43/53 [13]; UNHCR, 'The Human Right to a Clean, Healthy and Sustainable Environment' in 'Resolution Adopted by the Human Rights Council on 8 October 2021' (2021) UN Doc A/HRC/RES/48/13; UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75.

[229] *Neubauer* (n 6) [90].

[230] ibid [174].

[231] ibid [175].

[232] ibid.

[233] ibid [178].

[234] ibid.

[235] Tessa Khan, 'Shell's Historic Loss in The Hague Is a Turning Point in the Fight against Big Oil' (*The Guardian*, 1 June 2021) <www.theguardian.com/commentisfree/2021/jun/01/shell-historic-loss-hague-fight-big-oil> accessed 27 February 2024.

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the case 'will inspire a wave of similar actions around the world'.[236] Thus, the *Milieudefensie* court's use of international instruments, such as the UNGP and the Paris Agreement, will likely be instructive beyond the Netherlands' judicial system as climate litigants shift their attention towards corporations.

9.5 CONCLUSION

In interpreting the appropriate duty of care, courts have relied on international law and best available science, such as reports from the IPCC, international soft law, and national climate bodies. These cases have largely shied away from ascertaining the exact scope of a State's duty of care and instead looked at whether the appropriate measures reasonably required to mitigate climate change were adopted. In the process, a range of emerging best practices have taken shape, from the derivation of climate duties from constitutional provisions to the notion that States must each do their best and take climate action no matter their national emissions. Some of these emerging best practices will be more replicable than others, particularly in jurisdictions that share common legal systems as well as similar laws and international commitments with the cases analysed in this chapter. Considering the number of landmark decisions that have addressed duty of care owed by States and corporations in recent years – not to mention advisory opinions on climate change from the International Court of Justice, Inter-American Court of Human Rights, and the International Tribunal for the Law of the Sea in the near term[237] – this is a particularly dynamic area of climate jurisprudence that should continue to evolve rapidly as more cases come to trial.

[236] ibid.

[237] Obligations of States in Respect of Climate Change (Request For Advisory Opinion) <www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf> accessed 24 February 2024; Petition filed in Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency (IACtHR) <www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> accessed 24 February 2024; Request for an Advisory Opinion of 12 December 2022 <www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf> accessed 24 February 2024.

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