Four Farmers' Expedition: A Review of the *Shell* Case

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1. Introduction

A Dutch court made history in January 2021 by rendering a judgment holding that the Nigerian subsidiary company of Shell, a global group of energy and petrochemical companies, was liable for several oil spillages polluting the arable land and water in the Niger delta, endangering the lives of more than 30 million residents. In the judgment, the court also ordered both Shell's parental and subsidiary companies to install a leak detection system to avoid future leakages. Again, in a related class action in May 2021, the court issued the first instance decision that ordered Royal Dutch Shell (RDS), the Dutch-English parental company, to cut its global CO2 emissions by 45% at the end 2030, relative to 2019 levels, across both its own operations' emissions and end-users' emissions.(1) Hereinafter referred to as *Shell*, the cases include several different litigation stages which span over 10 years. Both decisions rendered in January and May are widely discussed and commented upon by environmentalists, international law scholars and practitioners.(2) They represent successful, even if only provisional at this stage, attempts that the parental companies could be held accountable for overseas subsidiary companies' wrongful acts causing environmental damages, thereby forcing multinationals, especially polluting corporations, to make a full pledge to fight climate change.

What preceded the climate change litigation,(3) which was launched in 2018 and decided by the first-instance court in May 2021, was the tort litigation brought by four Nigerian farmers under environmental NGOs' support against Shell Nigeria over damages caused by oil spills that took place between 2004 and 2007. Litigation in the Netherlands was initiated in 2008. The lengthy court procedure took more than a decade to finally have the prospect of coming to an end, with a provisional decision rendered by The Hague Court of Appeal in January 2021 in favour of Nigerian victims. This is, however, not an easy victory. Many interesting legal aspects can be picked up from the storyline.

2. *Milieudefensie et al. v. Royal Dutch Shell plc.*(4)

2.1 The Origins

The Royal Dutch Shell (hereinafter RDS) is the parent company of the Shell group. Established in the UK, it is headquartered in The Hague, the Netherlands; thus, it is often referred to as a Dutch-Anglo company. Shell has long been conducting oil extraction activities in Nigeria, and its local operations are mainly managed by the Shell Petroleum Development

(1) *Milieudefensie et al. v. Royal Dutch Shell plc.* ECLI:NL:RBDHA:2021:5339, 5.3.

(2) The cases appeared in many international law blogs and gained wide media coverage, to name only a few, Daniel Boffey, 'Court orders Royal Dutch Shell to cut carbon emissions by 45% by 2030' *The Guardian* (Brussel, 26 May 2021); David Vetter, 'Monumental Victory: Shell Oil Ordered To Limit Emissions In Historic Climate Court Case' *The Forbes* (26 May 2021); Xandra Kramer & Ekaterina Pannebakker, 'Shell litigation in the Dutch courts – milestones for private international law and the fight against climate change' (*Conflict of Law.Net*, 26 May 2021) <https://conflictoflaws.net/2021/shell-litigation-in-the-dutch-courts-milestones-for-private-international-law-and-the-fight-against-climate-change/> accessed 25 Nov 2021; Wubeshet Tiruneh, 'Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the *Four Nigerian Farmers and Milieudefensie v. Shell*' (*EJIL:Talk!*, 19 Feb 2021) <https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/> accessed Oct 20, 2021.

(3) Milieudefensie, 'Overview of legal documents climatecase against Shell' (*Milieudefensie*, 12 May 2021) <https://en.milieudefensie.nl/news/overview-of-legal-documents-climatecase-against-shell> accessed 20 Oct 2021.

Company of Nigeria (hereinafter SPDC), a Nigerian subsidiary company fully owned by Shell parent companies through subsidiaries.(5)

From 2004 to 2007, there were several oil spills from oil pipelines and oil installation, allegedly caused by inadequate security measures and defective equipment installed by the SPDC. As a result, the leaking oil damaged the underground soil and water in the neighbouring villages, causing harm to the environment of three villages, Oruma, Goi and Ikot Ada Udo in Nigeria. As representatives of the local communities, four local farmers proceeded to bring the case to the Netherlands. They are Barizza Manson Tete Dooh (hereby Dooh), resident of Goi, Fidelis Ayoro Oguru (hereby Oguru) and Alali EFANGA (hereby Efanga) of Oruma, Friday Alfred Akpan (hereby Akpan) of Ikot Ada Udo.

A Dutch environmental organization, Milieudefensie (Friends of the Earth Netherlands), has also intervened since the early stage of the case, providing all-around support to the farmers, and it later became a claimant in the proceedings. Four farmers and Milieudefensie brought the case against Shell companies, including both SPDC and RDS, for their wrongful acts causing damages to the local Nigerian environment due to oil leakages before the court of the Hague in 2008.

2.2 Why a Dutch Court?

One may question why they have chosen a Dutch court. Consider the facts of the case: direct victims, the four farmers and the communities' interests that they represent, are of Nigerian origin; the wrongful acts alleged, e.g., undue maintenance of oil pipelines, also took place in the territory of Nigeria; one of the defendants, SPDC, is also Nigerian company incorporated under Nigerian law. It seems that all material facts of the case concern Nigeria rather than the Netherlands, apart from the Dutch nationality of Milieudefensie and RDS as joining claimant and defendant respectively. It is also self-evident that both the Milieudefensie becoming the joining claimant, and the nomination of RDS as the first defendant, are strategies made to assign a Dutch factor to the case.

This scenario is, to some extent, not unfamiliar in the context of international litigation as litigants, in particular victims, are likely to exploit the advantages of choosing a judicial system in favour of them. However, chances of success relying on this tactic are not as promising based on previous experiences. For example, victims allegedly suffered from the 2011 Fukushima Daiichi nuclear disaster had brought numerous civil and criminal litigations both in domestic and foreign courts.(6) Domestic courts, being Japanese courts in this case, are undoubtedly the natural venue of dispute resolution considering all the factual links.(7) However, a case is also brought before a U.S. court by American sailors claiming damages sustained from exposure to excessive radiation following the 2011 disaster.(8) Eventually, the U.S. court dismissed the case on the grounds of international comity,(9) the outcome of which is not surprising.

Therefore, what the claimants have pursued in this case is essentially risky, for it is likely that the court may not exercise jurisdiction due to the lack of substantial connection between the case and the forum. Several clues hint at possible reasons that might have helped mobilize the claimants to a Dutch court. First, it was mentioned in the first instance judgment delivered in 2013(10) that Milieudefensie had a sister organization founded in Nigeria, named Environmental Rights Action, who had intervened early in

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(4) The case consists of six different litigations, which are referred to in 2021 judgement as cases a to f. Cases e and f, concerning Ikot Ada Udo, are still ongoing. The first stage of the proceeding is marked by the jurisdictional dispute which was decided in a judgment in 2009. The second stage includes the 2013 decision and the 2015 appeal decision focusing on the damages in Goi, while the 2021 decision concerns mainly Oruma.

(5) *Milieudefensie et al. v. Royal Dutch Shell plc.* ECLI:NL:RBDHA:2013:BY9845, 2.2.

(6) Fukushima on the globe, 'Plaintiffs suing over Fukushima nuclear disaster form nationwide network' (*Fukushima on the Globe*, 27 May 2015) <http://fukushimaontheglobe.com/citizens_movement/litigation-movement/4402.html> accessed 20 Oct 2021.

(7) For a recent paper documenting current progress, see Paul Jobin, 'The Fukushima Nuclear Disaster and Civil Actions as a Social Movement' (2020) 18 *The Asia-Pacific Journa* 1.

(8) Aaron Sheldrick, 'Japan's Tepco gets slapped with new U.S. lawsuit over Fukushima' *Reuters* (Tokyo, 24 August 2017).

(9) It is noted that a U.S. court was better not to exercise jurisdiction, see *Cooper v. Tokyo Elec. Power Co.* Case No: 12cv3032-JLS (JLB) 2019.

(10) *Milieudefensie et al. v. Royal Dutch Shell plc.* (n5), 2.9.

the investigation stage following the oil spill that occurred in Goi village before 2008.[11] It helped the Milieudefensie establish a close connection with the claimants for obtaining first-hand materials in relation to the leakages. Second, in recent decades, the Netherlands has gradually reformed its domestic law to facilitate the initiation of public interest litigations by empowering foundations to assume more roles as the protector of public interests[12] to the extent that the Hague receives a nickname of "legal capital of the world". This time, it is not because the city is home to many international tribunals, including the International Court of Justice and International Criminal Court, but because of the pioneering approach undertaken by the court. Finally, the website of Milieudefensie refers briefly to the difficulties experienced by two of the claimant farmers who failed at attempting to bring their cases to a local court due to the lack of transparency in the Nigerian judicial process and the suspicion that powerful multinationals such as the Shell could in many ways delay the process.[13] Seeking a fair trial is perhaps what motivates the defendants to initiative a case before a Dutch court.

It is interesting to note in the Dutch proceedings that the reasons why a Dutch forum should be considered a suitable venue were not much argued or even brought up by the claimants; while the issue of jurisdiction was mainly disputed by the defendants.

2.3 The First Hurdle: Jurisdiction

The first issue facing the Hague court is whether it is competent to hear a dispute, and this amounts to the first legal issue debated heavily by the defendants. The ruling on jurisdiction was delivered in 2010, where the court rejected the defendants' claim.[14]

It was not much disputed whether a Dutch court can exercise jurisdiction over the first defendant, RDS, because it was considered domiciled in the Netherlands in which its head office located under Art. 2(1) and 60(1) of Brussels I Regulation.[15] However, SPDC, the Nigerian subsidiary company, claimed that the claimants had abused the civil procedure by bringing the litigation to a forum in which SPDC was not domiciled. For this purpose, Art. 7 of the Dutch Code of Civil Procedure was invoked as the rule for a court to derive international jurisdiction over a nondomiciled defendant. It states:

> *"1. If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency."*

There are two things worth noting concerning the court's reasoning on this matter. First, the court takes the general stance that abuse of procedural law can only be established in very exceptional circumstances, "in particular if a claim is based on facts and circumstances of which the claimants knew or should have known the (obvious) inaccuracy or on statements of which the claimants had to understand in advance. That these had no (any) chance of success and were therefore completely unsound".[16] This perhaps explains at least in part the reason why both claimants did not explicitly present arguments concerning the jurisdiction issues[17] for any written statements could

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(11) Reageer, 'Godwin Ojo: "Why is Shell continuing their environmental racism?"' (*Down To Earth Magazine*, 12 Dec 2015) <https://downtoearthmagazine.nl/godwin-ojo-shell-environmental-racism/#respond> accessed 25 Nov 2021.

(12) This is especially exemplified by Article 3:305a Dutch Civil Code, see Otto Spijkers, 'Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law - Article 3.305a Dutch Civil Code' (*EJIL Talk!*, 6 Mar 2020) <https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/> accessed 25 Nov 2021.

(13) Milieudefensie, 'Frequently asked questions' (*Milieudefensie*) <https://en.milieudefensie.nl/shell-in-nigeria/frequently-asked-questions> accessed 20 Oct 2020.

(14) *Milieudefensie et al. v. Royal Dutch Shell plc.* ECLI:NL:RBSGR:2009:BK8616.

(15) Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters on the law applicable to contractual obligations (Brussel I) [2001] OJ L12/1

(16) *Milieudefensie et al. v. Royal Dutch Shell plc.* (n14), 3.2.

(17) As mentioned, it is a risky move, but no claimants explicitly refer to this as a bold strategy.

be utilized by the defendants to support their invocation against the court's exercise of jurisdiction. Second, Art. 7 DCCP essentially requests a connection between the two defendants' actions so close that it justifies a joint treatment as a matter of efficiency.[18] The fact that the alleged acts took place outside the Netherlands "is not exceptional in Dutch case law and does not lead to a different opinion about sufficient coherence and effectiveness within the meaning of Art. 7 DCCP."[19] SPDC's claim was therefore dismissed.

Unsatisfied with the result, SPDC raised the point again in the appeal in which the same decision was upheld.[20] The question here is a crucial one that often poses difficulties when determining international jurisdiction in many cases of this kind. The Court of Appeal of The Hague's judgment in 2015 indeed allows such a possibility that a Dutch company can be targeted by claimants, who are usually victims to an environmental tort, as the "anchor defendant". It enables a local court to extend jurisdiction to a foreign entity that otherwise may not be subject to the forum's jurisdiction in the absence of such an anchor defendant. The link between the anchor defendant and the foreign entity needs to be proved to satisfy the efficiency consideration for applying this approach.[21]

Considering the prospective impact, this approach essentially gives rise to the promise that subsidiary companies to a multinational corporation are very likely to be exposed to the jurisdiction at the place where the parent company locates, a place that is usually from more economically advanced jurisdictions compared to the place where the subsidiary company is located. Furthermore, this is not a stand-alone case, but rather it, to some extent, has become an international trend in which courts tend to broadly interpret the jurisdictional rules on joinder defendants for overseas environmental and human rights abuses.[22] Another recent example is the *Okpabi v Shell* case,[23] a class action Nigerian farmers instituted against both RDS and SPDC for causing oil pollution in the Niger Delta. The decision rendered in February 2021 by the UK Supreme Court also confirms that the English court has jurisdiction over overseas subsidiaries as a joinder defendant in the alleged claim.

A more nuanced issue is raised here and has been discussed in both key cases.[24] It asks whether a breach of duty of care owed by the parental company to its subsidiary company concerning the wrongful acts needs to be proved as a precondition for a court to exercise jurisdiction over the overseas joinders. This is preferred by the defendant groups in that it is invoked to avoid being subject to the jurisdiction at the place of the parental company. It is also worth noting that the arduous debate on the issue of duty of care at the stage of determining jurisdiction has been criticized by scholars because it makes the trial unnecessarily lengthy to even become a mini-trial on its own.[25] It needs to be clarified that a decision on jurisdiction, albeit referring to the doctrine of the duty of care is not equal to the finding of parental company's liability, for the latter is a matter of substantive law issue to be determined at a later stage.

2.4 The Question of Applicable Law: Why It Matters?

Once the first hurdle is cleared, the next question is to determine the substantive law applicable to the present dispute, i.e., the law governing the issue of liabilities of both RDS and SPDC. Section 4 of the 2013 first instance decision considers the question at length.[26] Potentially applicable laws in this case only

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⑱ *Milieudefensie et al. v. Royal Dutch Shell plc.* (n14), 3.5.

⑲ Ibid (n14), 3.6.

⑳ *Milieudefensie et al. v. Royal Dutch Shell plc.* ECLI:NL:GHDHA:2015:3586 (Gerechtshof Den Haag), in general 3.1-3.8.

㉑ Ibid, 3.3-3.5.

㉒ The *Shell* decision referred in many instances to relevant English authorities, see ibid, 3.2 &3.6.

㉓ *Okpabi and others v Royal Dutch Shell* [2021] UKSC 3.

㉔ *Milieudefensie et al. v. Royal Dutch Shell plc.* (n20), 3.2.

㉕ See Robert McCorquodale, '*Okpabi v Shell*. The Supreme Court reverses the Court of Appeal and the High Court on jurisdictional hurdles in parent/subsidiaries cases' (*GAVC LAW*, 17 Feb 2021) <https://gavclaw.com/2021/02/17/okpabi-v-shell-the-supreme-court-reverses-the-court-of-appeal-and-the-high-court-on-jurisdictional-hurdles-in-parent-subsidiaries-cases-guest-blog-by-professor-robert-mccorquodale/> accessed 25 Nov 2021; Ruth Cowley and others, 'UK Supreme Court clarifies issues on parent company liability in *Okpabi and others v Royal Dutch Shell Plc*' *Norton Rose Fulbright* (UK, Feb 2021).

㉖ *Milieudefensie et al. v. Royal Dutch Shell plc.* (n5), 4.10-11.

include Dutch law and Nigerian law, with the former preferred by the claimants and the latter favoured by the defendants.

The general conflict of laws principle on tort choice of law would hinge on the place in which such damages have occurred, Nigeria in this case.[27] Thus, Nigerian law should be applied to determine the substantive responsibilities of the companies unless under exceptional circumstances where applying Nigerian law would be incompatible with the public policy of the Dutch law.[28] As a former colony of the UK, English common law is regarded as highly authoritative in the Nigerian legal system and needs to be assessed as a source of Nigerian law. Therefore, it becomes evident that both the court of the first instance and the appeal court conducted significant analysis on the common law duty of care doctrine to establish the tort of negligence in the present case.[29]

The application of Nigerian law here again triggers an old-fashioned predicament facing private international lawyers. On the one hand, the cosmopolitan view of private international law encourages domestic courts to consider the application of foreign law whenever possible, as it indicates the neutrality of the forum in handling disputes with foreign factors. On the other hand, the real-life application of foreign legal rules unfamiliar to local judges is not always a sweet experience. In this case, the Dutch judgment, albeit deserving celebration merely out of environmental consciousness, is also criticized by English law scholars for not properly construing the common law duty of care when establishing the parent company's liability.[30] Comparatively, the liability on the part of the subsidiary company, SPDC, is easier to determine as the court can rely on Nigerian statutory provisions,[31] but the part on the parental company, RDS, proves to be difficult since it needs to engage in a detailed discussion of common law authorities. It is not simply a question of familiarity with an external legal system different from the forum or a matter of contesting a judiciary's competency, but rather it is difficult because of the specific characteristics of common law.

The legal doctrines in common law are ever-evolving. "It (common law) comes from a patchwork of overlapping decisions and legislative initiatives that transcend borders, both territorial and doctrinal."[32] It then raises the fundamental question of whether it is, in fact, possible to expect a high degree of accuracy when applying common law doctrine in a civil law court. In this case, Nigerian law is applied as the governing law, but the extent to which new English authorities after 1960[33] should be considered part of Nigerian legal sources is in doubt. It is even more problematic if the new English authorities are controversial, which is again not very rare. Would it be too much to ask civil law judges to keep up with all recent developments of relevant common law doctrines and, to understand the technicalities and intricacies of applying different approaches to construe relevant doctrine properly? Engaging a question as such may even discourage any future attempts to consider the application of common law in a non-common law jurisdiction.

Even if the Dutch court might have wrongfully construed a few common law authorities in this case, there would not be severe harm since the Netherlands is not a strictly precedent-based jurisdiction. Whatever analysis conducted by this court on a foreign legal system will unlikely, at least doctrinally, be binding on

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[27] Since the tortious act, occurred in 2004, falls outside the temporal scope of relevant EU legal instrument, the Dutch domestic conflict of law rules apply to determine the choice of law issue, but there is no essential difference in the results applying different instruments, see Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

[28] Section 10:6 or 10:7 of the Dutch Civil Code.

[29] *Milieudefensie et al. v. Royal Dutch Shell plc.* (n5) 4.27-4.42; *Milieudefensie et al. v. Royal Dutch Shell plc.* ECLI:NL:GHDHA:2021:1825, 3.18-3.28.

[30] Specially, it is contended that the Dutch court misread *Lungowe v Vedanta*, *Caparo v Dickman*, in their reasoning, see Lucas Roorda, 'Broken English: a critique of the Dutch Court of Appeal decision in *Four Nigerian Farmers and Milieudefensie v Shell*' (2021) 12 *Transnational Legal Theory* 144.

[31] *Milieudefensie et al. v. Royal Dutch Shell plc.* (n29), Section 6.

[32] Roorda (n30), 150.

[33] After Nigeria gained independence in 1960, the reference to new English authorities would not be compulsory. Similar situations can also be found in other jurisdictions with common law tradition, e.g., Hong Kong SAR.

prospective cases. Therefore, it reserves room for any corrections and adjustments to be undertaken by the judiciary in the future. Nonetheless, an appreciation of recent international trends in the relevant area of law has certainly proven to be beneficial, especially when a domestic court is taking up a tough task such as this.

3. Takeaways

To conclude, there are certainly many lessons that can be learned from this high-profile case, and the following section only points to a few.

The question of delayed justice

The litigation in the Dutch court lasted for over 10 years, and by the time decisions concerning damages sustained by two out of three villages were delivered in January 2021, two out of the original four farmer claimants had already passed away. Their respective heirs superseded their roles in the litigation when the winning judgments were handed down. The sister-like class action on similar matters in the UK also has a lengthy procedure. It is encouraging to see a winning judgment at last, for this also opens a door for other victims facing similar situations to consider alternative judicial redress. However, as the saying goes, "justice delayed is justice denied". Justice also needs to be delivered in time, while this appears to be an extremely complicated task, perhaps for all environment-related disputes. In addition, preventative measures rather than restorative measures truly make a long-term difference in advancing environmental awareness and protection. Given the significant impacts of this case, it is hopeful that multinational companies can commit to their responsibilities against environmental torts.

The role of environmental organizations

Milieudefensie has undoubtedly played a key role in supporting individual claimants throughout the arduous procedure and in seeing things taking a positive turn. They hailed for victory after obtaining the awards earlier this year, but it was even more striking to see that they went even further to challenge the Shell companies in the climate change litigation, which also seemed to produce some good provisional results. The role of environmental organizations of this sort is an underdeveloped topic on questions including how to strike a balance between the rights and responsibilities of these organizations. They are certainly increasingly empowered, at least in some jurisdictions, as being the key actors in the public interest litigation regime. If, however, they were to assume a greater role in fighting global issues such as climate change, crucial questions such as business organization and governance structure need to be brought to the front stage and be critically assessed to ensure accountability.

Judicial activism

The Dutch court indeed exhibited great judicial activism in the present case. This raises concerns on whether the decision would open the floodgate of environmental litigations of a similar kind. It becomes even more impactful if we jointly consider the global communities' attempts to build a recognition and enforcement mechanism for foreign judgments. The ideal is to enable judgments to flow across borders with fewer limitations. Under this scheme, a jurisdiction with active judicial practice can achieve a lot more on a wider scale than what one single jurisdiction can achieve, because judgments from more active jurisdictions could be recognised and enforced in a less active forum, achieving what could not have been done by the latter forum through a pure domestic procedure. Whether other jurisdictions will follow suit is not easy to speculate at this point, but the driving forces are there already. As discussed before, the judicial approach undertaken to achieve this effect is still open to question, e.g., whether a common-law analysis is sustainable in the future. However, to say the very least, this is a good example for those having difficulties finding a promising forum when their domestic judicial system may prevents the delivery of justice in any way. Undoubtedly, the Netherlands will see more similar cases of this kind in the coming future.

Endnote

1. Aaron Sheldrick, 'Japan's Tepco gets slapped with new U.S. lawsuit over Fukushima' *Reuters* (Tokyo, 24 August 2017).
2. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters on the law applicable to contractual obligations (Brussel I) [2001] OJ L12/1.
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4. *Cooper v. Tokyo Elec. Power Co.* Case No: 12cv3032-

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5. Daniel Boffey, 'Court orders Royal Dutch Shell to cut carbon emissions by 45% by 2030' *The Guardian* (Brussel, 26 May 2021).
6. David Vetter, 'Monumental Victory: Shell Oil Ordered To Limit Emissions In Historic Climate Court Case' *The Forbes* (26 May 2021).
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17. Paul Jobin, 'The Fukushima Nuclear Disaster and Civil Actions as a Social Movement' (2020) 18 *The Asia-Pacific Journa* 1.
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22. Xandra Kramer & Ekaterina Pannebakker, 'Shell litigation in the Dutch courts – milestones for private international law and the fight against climate change' (*Conflict of Law.Net*, 26 May 2021) <https://conflictoflaws.net/2021/shell-litigation-in-the-dutch-courts-milestones-for-private-international-law-and-the-fight-against-climate-change/> accessed 25 Nov 2021.