

## CASE COMMENT

# *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation*

*Milieudefensie v. Royal Dutch Shell*

District Court of The Hague (The Netherlands)

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### Abstract

On 26 May 2021, the District Court of The Hague (The Netherlands) passed an innovative judgment in *Milieudefensie v. Royal Dutch Shell*. The Court interpreted Shell's duty of care towards the inhabitants of the Netherlands as requiring it to mitigate climate change by reducing the carbon dioxide emissions resulting from its global operations by at least 45% by 2030, compared with 2019. This case comment salutes the identification of a corporate duty of care for climate change mitigation but expresses scepticism regarding the Court's interpretation of this duty. The Court's reading of global climate mitigation objectives and climate science, which form the basis of its determination of Shell's requisite level of mitigation action, is plagued with inconsistencies. It is argued here that, in order to determine the standard of care applicable to Shell, the Court should have relied not only on a 'descending' reasoning as to what ought to be done, but also on an 'ascending' reasoning accounting for industry practices.

**Keywords:** Climate change mitigation, Climate litigation, Tort law, Duty of care, Corporation, Oil and gas

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## 1. INTRODUCTION

The judgment of 26 May 2021 of the District Court of The Hague (The Netherlands) in *Milieudefensie v. Royal Dutch Shell* recognized an obligation on the part of Royal Dutch Shell (Shell) to mitigate climate change. In the application of this obligation, Shell was ordered to reduce all carbon dioxide (CO<sub>2</sub>) emissions resulting from its global operations – including those from the combustion of the oil-and-gas products it supplies to customers – by 45% by 2030, compared with 2019.<sup>1</sup> This is the first time that a court has imposed such a broad mitigation obligation on a corporation. It is also one of the first occasions on which tort law has successfully been invoked in litigation on climate change mitigation.<sup>2</sup> The District Court declared the judgment to be provisionally enforceable,<sup>3</sup> even though Shell has (unsurprisingly) indicated its intention to appeal.<sup>4</sup> The judgment is likely to have an impact on ongoing litigation against various oil-and-gas and public utility corporations in the Netherlands and elsewhere.<sup>5</sup>

This case comment presents a critical perspective on the judgment. It salutes the recognition of a corporate duty of care for climate change mitigation, but it also expresses scepticism regarding the Court's interpretation of this duty. As a result of several inconsistencies in its reasoning, the District Court fails to justify Shell's requisite level of mitigation action in any coherent manner. In particular, the Court relies on the doubtful assumption that Shell's requisite level of mitigation action can be directly inferred from global mitigation objectives and climate science, in isolation from more empirical considerations. The comment concludes that the District Court should have considered not only these global objectives, but also the practice of other companies involved in the same sector, to determine what Shell can *realistically* be expected to do with regard to climate change mitigation.

Section 2 provides an overview of relevant procedural aspects of the case. Section 3 notes the identification of Shell's duty of care for climate change mitigation under Dutch law. Section 4 reveals four major inconsistencies in the Court's interpretation of this mitigation duty as requiring Shell to achieve a specified mitigation outcome. Section 5 outlines an alternative judicial methodology to interpret a company's climate mitigation duty. Section 6 concludes.

<sup>1</sup> *Milieudefensie v. Royal Dutch Shell*, District Court of the Hague (DC), 26 May 2021, ECLI:NL:RBDHA:2021:5337 (*Milieudefensie*), English translation ECLI:NL:RBDHA:2021:5339 available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>.

<sup>2</sup> See *Sharma v. Minister for the Environment* [2021] FCA 560 (on appeal); *Klimaatzaak v. Belgium*, Case 2015/4585/A (French-Speaking Tribunal of First Instance of Brussels, 17 June 2021), English translation available at: <https://perma.cc/68ZJ-2F96>. See also *Smith v. Fonterra Co-operative Group Ltd* [2020] NZHC 419, but see the appeal decision in *Smith v. Fonterra* [2021] NZCA 552. Several other cases are currently pending before courts, in particular in the United States (US); see generally Climate Change Litigation Databases, available at: <http://climatecasechart.com/climate-change-litigation>.

<sup>3</sup> *Milieudefensie*, n. 1 above, para. 5.8.

<sup>4</sup> J. Ambrose, 'Oil Giant Shell Set to Appeal against Ruling on Carbon Emissions', *The Guardian*, 20 July 2021, available at: <https://www.theguardian.com/environment/2021/jul/20/oil-giant-shell-set-to-appeal-ruling-on-carbon-emissions>.

<sup>5</sup> See, in particular, T.J. Nanterre, 11 Feb. 2021, RG20/00915, *Notre Affaire à Tous v. Total* (decision on jurisdiction); and generally Climate Change Litigation Databases, n. 2 above.

## 2. PROCEDURAL ASPECTS

The case was brought by seven non-governmental organizations (NGOs) and 17,379 individuals against Shell – the parent holding company of a complex international network of subsidiaries producing and distributing oil and gas around the world – based on the climate impacts of the group’s global operations. The respondent did not challenge the District Court’s jurisdiction, which the claimants justified as based alternatively on Shell’s domicile (its headquarters are situated in The Hague) or the place where the events causing the tort (the adoption of the group’s strategies) took place.<sup>6</sup> The respondent also did not question, as a matter of principle, that a parent company can owe a duty of care for the overseas operations of its subsidiaries. This principle had been recognized in a number of previous cases, including one involving some of the same parties, decided by the Court of Appeal of The Hague just a few months earlier.<sup>7</sup>

Shell raised two preliminary questions regarding the standing of the plaintiffs and the applicability of Dutch law. Regarding the former, the Court admitted a class action by six of the NGO plaintiffs, representing the interests of Dutch residents and residents of the Wadden Sea area, which straddles the German border.<sup>8</sup> It did not give standing to the seventh NGO (Action Aid), which sought to represent the interests of foreign populations. The Court considered that this would bundle dissimilar interests, alluding to ‘huge differences in the time and manner in which the global population at various locations will be affected by global warming’.<sup>9</sup>

The factual bases for this finding are questionable as no scientific evidence was provided for distinguishing between the impacts of climate change occurring within the Netherlands and those taking place elsewhere, at least some of which are prima facie very similar.<sup>10</sup> Nevertheless, having made this finding, the Court should have reflected it in its substantive discussion about the need to mitigate climate change. Determining the requisite level of action on climate change mitigation inevitably involves, one way or another, a balance between the costs of mitigation action and its benefits (that is, the avoidance of additional climate impacts, or the reduction in the risks thereof).<sup>11</sup> The case for reducing Shell’s global CO<sub>2</sub> emissions would have been much stronger if the

<sup>6</sup> *Milieudefensie*, n. 1 above, Summons, 4 May 2019, paras 77–88. See Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351/1 (Brussels I bis Regulation), Arts 4(1) and 7(2).

<sup>7</sup> See, e.g., Court of Appeal of The Hague (CA), *Oguru v. Shell Petroleum*, 29 Jan. 2021, ECLI:NL:GHDHA:2021:132. See also *Dooh v. Royal Dutch Shell*, CA, 18 Dec. 2015, ECLI:NL:GHDHA:2015:3586, para. 3.2; *Okpabi v. Royal Dutch Shell* [2021] UKSC 3, [2021] 1 WLR 1294.

<sup>8</sup> *Milieudefensie*, n. 1 above, para. 4.2.4. On the legal basis for class action, see Burgerlijk Wetboek (BW) (Dutch Civil Code), Art. 3:305a.

<sup>9</sup> *Milieudefensie*, n. 1 above, para. 4.2.3.

<sup>10</sup> *Ibid.*, paras 2.3.7–9 (mentioning, e.g., heatwaves, sea-level rise, and changes in precipitation patterns).

<sup>11</sup> O. Edenhofer et al., ‘Technical Summary’, in O. Edenhofer et al. (eds), *Climate Change 2014: Mitigation of Climate Change. Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), pp. 33–107, at 37; W.D. Nordhaus, *A Question of Balance: Weighing the Options on Global Warming Policies* (Yale University Press, 2008).

Court had considered the global benefits of doing so, rather than including only the benefits accruing within the territory of the Netherlands.

The Court refused standing to the individual plaintiffs on the ground that they lacked ‘a sufficiently concrete individual interest’.<sup>12</sup> This is in line with recent decisions in several other jurisdictions where standing to invoke mitigation obligations has been awarded to parties representing public interests but not to those wanting to vindicate individual rights.<sup>13</sup> These decisions appear justified in the light of the fact that the impacts of climate change, albeit significant, are diffuse, and it may not be possible to identify individual ‘victims’ of climate change, or individuals with a sufficiently distinct risk of becoming victims.

To justify the application of Dutch law, the Court relied on Article 7 of the European Union (EU) Regulation (EC) No. 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II Regulation),<sup>14</sup> *lex loci commissi delicti*: the Netherlands is ‘the country in which the event giving rise to the [environmental] damage occurred’, in so far as the group’s worldwide CO<sub>2</sub> emissions can be traced to strategic decisions made at its headquarters in the Netherlands.<sup>15</sup> As the Court acknowledged, this interpretation of the Rome II Regulation implies that more than one event could give rise to the same environmental damage<sup>16</sup> and, thus, that more than one law could be applicable as *lex loci commissi delicti*. By allowing plaintiffs to select the law most favourable to their case, this construction of the Rome II Regulation subjects corporations to greater risks of litigation for the environmental harm caused in the course of their international operations.

### 3. A CORPORATE DUTY OF CARE FOR CLIMATE MITIGATION

The most innovative aspect of the judgment regards its interpretation of the Dutch law on torts as requiring the defendant to take climate change mitigation action. The relevance of tort law to climate change mitigation has long been discussed in academic circles, but few cases have actually been brought before the courts on this basis,<sup>17</sup> and even fewer have overcome procedural challenges and led to favourable substantive decisions.<sup>18</sup> One of these exceptions is the case of *Urgenda v. The Netherlands*, where the same District Court (with different judges) found that the State of the

<sup>12</sup> *Milieudefensie*, n. 1 above, para. 4.2.7.

<sup>13</sup> See, e.g., *Urgenda v. The Netherlands*, Supreme Court of the Netherlands (SC), 20 Dec. 2019, ECLI:NL:HR:2019:2007, para. 5.9.1; Case T-330/18, *Carvalho and Others v. European Parliament and Council of the European Union*, ECLI:EU:C:2021:252, paras 37–44; *Backsen v. Germany*, VG Berlin, 31 Oct. 2019, VG10K412.18; *Friends of the Irish Environment v. Ireland* [2020] IESC 49, [2020] 2 ILRM 233, para. 7.24; *Grande-Synthe v. France*, CE Sect (Decision on Admissibility) 19 Nov. 2020, ECLI:FR:CECHR:2020:427301.20201119 paras 3–7. See also G. Winter, ‘Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation’ (2020) 9(1) *Transnational Environmental Law*, pp. 137–64.

<sup>14</sup> [2007] OJ L 199/40.

<sup>15</sup> *Milieudefensie*, n. 1 above, para. 4.3.6.

<sup>16</sup> *Ibid.*

<sup>17</sup> See, e.g., *Kivalina v. ExxonMobil Corp* (2012) 696 F 3d 849; *American Electric Power Co v. Connecticut* (2011) 564 US 410; *City of New York v. Chevron Corporation* (2021) 993 F 3d 81.

<sup>18</sup> See n. 2 above.

Netherlands had an obligation to reduce its greenhouse gas (GHG) emissions by 25% by 2020, compared with 1990.<sup>19</sup> In retrospect, the *Urgenda* case was relatively low-hanging fruit: states certainly have an obligation to mitigate climate change as *parens patriae* – obviously so under climate treaties,<sup>20</sup> and arguably also under customary law,<sup>21</sup> and perhaps then also under tort law or (as the Supreme Court found in *Urgenda*) human rights treaties.<sup>22</sup> To make the same argument stick with regard to private companies operating in a competitive environment is more difficult, even in the case of a multi-national oil-and-gas company to which slightly over 2% of global historical CO<sub>2</sub> emissions can be attributed.<sup>23</sup>

The Court noted that Shell's mitigation duty 'ensues from' Article 6:162 of the Burgerlijk Wetboek (BW) (Dutch Civil Code).<sup>24</sup> This provision defines tortious acts as including acts and omissions 'in violation of ... what according to unwritten law has to be regarded as proper social conduct'.<sup>25</sup> Accordingly, the Court considered that Shell 'must observe the due care exercised in society', to be interpreted in the light of 'all circumstances of the case'.<sup>26</sup>

Despite the brevity of the Court's explanation, this part of the judgment is convincing. Shell's defence was based largely on the lack of a direct causal link between the action of the parent company and the resulting climate impacts.<sup>27</sup> Yet, strategic decisions that outline the global operations of a major oil-and-gas corporation have a sufficiently foreseeable impact on global CO<sub>2</sub> emissions, and thus on the diffuse harm that climate change causes to ecosystems and societies, to justify the existence of a duty of care.<sup>28</sup> The need for oil-and-gas companies to reduce emissions is not only implied by science and international objectives, but also acknowledged by these very companies, most of which have adopted and implemented relevant policies.<sup>29</sup> Shell itself had

<sup>19</sup> Court of Appeal (CA), *Urgenda v. The Netherlands*, Court of Appeal (CA), 24 June 2015, ECLI:NL:RBDHA:2015:7196. The CA and the SC affirmed the judgment on a different legal basis (the European Convention on Human Rights and Fundamental Freedoms, Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>) without dismissing the applicability of tort law.

<sup>20</sup> See, e.g., Art. 4 of the United Nations Framework Convention on Climate Change (UNFCCC), New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>; and Art. 4(2) of the Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf).

<sup>21</sup> See, e.g., *Urgenda* (SC), n. 13 above, para. 5.7.5; B. Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics' (2016) 19(1) *Asia Pacific Journal of Environmental Law*, pp. 79–104.

<sup>22</sup> *Urgenda* (SC), n. 13 above. See discussion in B. Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115(3) *American Journal of International Law*, pp. 409–51.

<sup>23</sup> R. Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 *Climatic Change*, pp. 229–41, at 237. While some emissions take place during Shell's operations, most of these emissions result from the combustion of fossil fuels provided by Shell to their consumers, from public utility companies to individual car drivers.

<sup>24</sup> *Milieudefensie*, n. 1 above, para. 4.4.1.

<sup>25</sup> Art. 6:162(2) BW.

<sup>26</sup> *Milieudefensie*, n. 1 above, para. 4.4.1.

<sup>27</sup> *Milieudefensie*, n. 1 above, Shell, Statement of Defence, 13 Nov. 2019, paras 6, 7.4.

<sup>28</sup> See by analogy *Sharma*, n. 2 above, paras 91–138.

<sup>29</sup> See H. Lu, L. Guo & Y. Zhang, 'Oil and Gas Companies' Low-Carbon Emission Transition to Integrated Energy Companies' (2019) 686 *Science of the Total Environment*, pp. 1202–9; N. Nasiritousi, 'Fossil

already defined a mitigation objective (reducing its net carbon footprint by 30% by 2035, compared with 2016) and taken some measures to achieve it (such as by reducing flaring, venting, and fugitive emissions, and by investing in low-carbon energy and carbon sinks).<sup>30</sup>

The key question of the case, therefore, was not so much the existence of a duty of care for climate change mitigation, but rather its content. A company would certainly be in breach of its duty of care if, acting in isolation from other companies, it was single-handedly responsible for GHG emissions causing dangerous interference with the climate system. Yet, even a large oil-and-gas corporation like Shell is responsible (directly or indirectly) only for a limited share of global GHG emissions,<sup>31</sup> and it is part of a global economy that relies heavily on fossil fuels. Determining the content of the duty of care of such a corporation – the level of GHG emissions that would be allowed without breaching this duty of care – is a challenging task. As the following shows, this part of the judgment is plagued by inconsistencies, which originate from the Court’s questionable assumption that Shell’s requisite level of mitigation action can be inferred from global mitigation objectives and climate science.

#### 4. THE JUDICIAL ASSESSMENT OF SHELL’S REQUISITE MITIGATION ACTIONS

The Court sought to determine what would constitute Shell’s ‘proper social conduct’ with regard to climate change mitigation by reference to several ‘circumstances’.<sup>32</sup> In particular, the Court referred to ‘widely accepted soft law instruments’,<sup>33</sup> such as the United Nations (UN) Guiding Principles on Business and Human Rights,<sup>34</sup> to suggest that human rights treaties could be relevant in assessing Shell’s duty of care.<sup>35</sup> This aspect of the judgment has attracted considerable attention.<sup>36</sup> Yet, even if one accepts

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Fuel Emitters and Climate Change: Unpacking the Governance Activities of Large Oil and Gas Companies’ (2017) 26(4) *Environmental Politics*, pp. 621–47; M. Bach, ‘The Oil and Gas Sector: From Climate Laggard to Climate Leader?’ (2019) 28(1) *Environmental Politics*, pp. 87–103.

<sup>30</sup> Shell, 2020 Responsible Investment Annual Briefing Slides, 16 Apr. 2020, available at: <https://www.shell.com/investors/investor-presentations/2020-investor-presentations/responsible-investment-annual-briefing-april-16-2020.html>.

<sup>31</sup> See n. 23 above.

<sup>32</sup> *Milieudefensie*, n. 1 above, para. 4.4.2. This follows broadly the precedent of the Dutch SC in *Coca Cola Export Corporation v. Duchateau*, 5 Nov. 1965, ECLI:NL:HR:1965:AB7079.

<sup>33</sup> *Milieudefensie*, n. 1 above, para. 4.4.11.

<sup>34</sup> Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Doc. A/HRC/17/31, 21 Mar. 2011, available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>35</sup> *Milieudefensie*, n. 1 above, para. 4.4.10.

<sup>36</sup> See, e.g., Center for International Environmental Law (CIEL), ‘Watershed Decision Orders Shell to Slash Emissions to Respect Human Rights’, 26 May 2021, available at: <https://www.ciel.org/news/watershed-decision-orders-shell-to-slash-emissions-to-respect-human-rights>; A. Savaresi & M. Wewerinke-Singh, ‘Friends of the Earth (Netherlands) v. Royal Dutch Shell: Human Rights and the Obligations of Corporations in The Hague District Court Decision’, *The Global Network for Human Rights and the Environment*, 31 May 2021, available at: <https://gnhre.org/2021/05/31/friends-of-the-earth-netherlands-v-royal-dutch-shell-human-rights-and-the-obligations-of-corporations-in-the-hague-district-court-decision>; C. Macchi & J. van Zeven, ‘Business and Human Rights Implications of Climate Change

that human rights treaties can be interpreted as having such horizontal effects on corporations,<sup>37</sup> these treaties do not contain any specific standards that can help to determine the requisite level of mitigation action of any particular actor. This is true with regard to states,<sup>38</sup> and even more so for corporations. Thus, the reference to human rights treaties is purely ornamental; it cannot help the Court to determine the content of Shell's mitigation duty. Nor is the reference to human rights helpful in determining the existence of a duty of care;<sup>39</sup> the fact that CO<sub>2</sub> emissions cause illicit harm can be justified without reference to human rights law.

The decisive factor in the Court's determination of Shell's mitigation duty is the global objective of limiting global warming to 1.5 or 2°C above pre-industrial levels.<sup>40</sup> However, as the following will show, it is only as the result of four consecutive mischaracterizations and misconstructions of this objective that the Court could interpret this objective as requiring Shell to reduce its CO<sub>2</sub> emissions by 45% by 2030, compared with 2019.<sup>41</sup>

Firstly, the Court suggested that the temperature targets 'are derived from' reports of the Intergovernmental Panel on Climate Change (IPCC).<sup>42</sup> Yet, while these targets are vaguely informed by science, they result essentially from political agreements.<sup>43</sup> The scientific method cannot make the value judgments necessary to determine the right balance between the costs and benefits of mitigation;<sup>44</sup> as such, the IPCC is precluded from making any such policy recommendations.<sup>45</sup> Having mischaracterized the origin and nature of the temperature targets, the Court envisioned them as something that *must* be achieved as a matter of scientific necessity, when they are merely a political objective that states endeavour to achieve through cooperation.<sup>46</sup>

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Litigation: *Milieudefensie et al. v. Royal Dutch Shell* (2021) 31(3) *Review of European, Comparative and International Environmental Law*, pp. 409–15, at 413.

<sup>37</sup> On this ongoing debate see, e.g., J.H. Knox, 'Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law*, pp. 1–47; M.K. Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14(1) *Human Rights Law Review*, pp. 133–47; J. Bonnitcha & R. McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law*, pp. 899–919.

<sup>38</sup> See also B. Mayer, '*The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92; B. Mayer, 'Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review' (2019) 28(2) *Review of European, Comparative and International Environmental Law*, pp. 107–21.

<sup>39</sup> See *Milieudefensie*, n. 1 above, para. 4.4.6.

<sup>40</sup> Paris Agreement, n. 20 above, Art. 2(1)(a).

<sup>41</sup> It is not always clear whether and to what extent these misconstructions and mischaracterizations originate from the Court's reasoning or from the party submissions. The point in this comment is not to assess the work of the Court, but rather the internal consistency of the judgment as a whole.

<sup>42</sup> *Milieudefensie*, n. 1 above, para. 4.4.27.

<sup>43</sup> S. Randalls, 'History of the 2°C Climate Target' (2010) 1(4) *WIREs Climate Change*, pp. 598–605.

<sup>44</sup> R. Knutti et al., 'A Scientific Critique of the Two-Degree Climate Change Target' (2016) 9 *Nature Geoscience*, pp. 13–8.

<sup>45</sup> IPCC, 'Principles Governing IPCC Work', 1–3 Oct. 1998, last revised 14–18 Oct. 2013, available at: <https://www.ipcc.ch/documentation/procedures>.

<sup>46</sup> B. Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change' (2021) 33(3) *Journal of Environmental Law*, pp. 585–610, at 591.

Secondly, the Court largely ignored the relative indeterminacy of the temperature targets (for example, 1.5 or 2°C?)<sup>47</sup> when suggesting that they could be used to determine Shell's requisite mitigation action. The Court selected an IPCC mitigation pathway that assumes a 45% reduction in global CO<sub>2</sub> emissions by 2030, compared with 2010.<sup>48</sup> As the Court notes, this projection would 'yield a 50% chance of limiting global warming to 1.5°C and an 85% chance of limiting global warming to 2°C'.<sup>49</sup> Yet, the Court does not justify its selection of this pathway over any other pathway consistent with a plausible interpretation of the temperature targets. For instance, another IPCC pathway, associated with a 66% chance of achieving the 2°C target, assumes only a 25% reduction in global CO<sub>2</sub> emissions by 2030, compared with 2010.<sup>50</sup>

Thirdly, the Court implicitly assumes that Shell must reduce emissions from its global operations at the same pace as global CO<sub>2</sub> emissions are projected to decrease.<sup>51</sup> Yet, emissions reductions inevitably unfold differently in various segments of the global economy. For instance, the largest share of mitigation outcomes from 2010 to 2030 is expected to result from massive cuts in coal consumption, while natural gas could continue to be used widely as a substitute for more CO<sub>2</sub>-intensive fuels.<sup>52</sup> A projection developed by the International Energy Agency (IEA), using assumptions consistent with the 1.5°C pathway selected by the Court, suggests that overall CO<sub>2</sub> emissions from the combustion of oil and gas will only decrease by 19% from 2010 to 2030 (30% for oil, 1% for gas), compared with a 57% reduction for coal.<sup>53</sup> Shell may have more presence in some segments of the global oil-and-gas market than in others: it may, for instance, produce more oil, or more gas, than the average oil-and-gas corporation, or sell it in countries or sectors where consumption would be expected to decrease more quickly, or more slowly, than the global average. As such, it cannot simply be assumed that Shell's emissions reduction trajectory will follow the sectoral average suggested by the IEA, any more than it can be expected to follow the global emissions reduction trajectory outlined by the IPCC. Overall, any such projection is necessarily based on questionable equity assumptions on the distribution of the costs of mitigation action. The IPCC and the IEA scenarios seek to define a *least-cost* way of achieving a certain mitigation outcome, but this would not necessarily result in a justifiable allocation of the costs of mitigation action within societies and among countries and generations.

<sup>47</sup> M.R. Allen et al., 'Framing and Context', in V. Masson-Delmotte et al. (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC, 2019), pp. 49–91, at 58–66.

<sup>48</sup> M.R. Allen et al., 'Summary for Policymakers', in Masson-Delmotte et al., *ibid.*, pp. 3–24, at 12.

<sup>49</sup> *Milieudefensie*, n. 1 above, para. 4.4.29.

<sup>50</sup> Allen et al., n. 48 above, p. 12. The Report does not quantify the likelihood that this pathway would hold global warming below 1.5°C, but one could surely frame it as consistent with the goal of 'pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels': Paris Agreement, n. 20 above, Art. 2(1)(a) (emphasis added).

<sup>51</sup> *Milieudefensie*, n. 1 above, para. 4.4.38.

<sup>52</sup> IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector', May 2021, p. 101, available at: <https://www.iea.org/reports/net-zero-by-2050>.

<sup>53</sup> Calculation by the author based on historical data from IEA, 'CO<sub>2</sub> Emissions from Fuel Combustion 2020', available at: <https://www.iea.org/reports/greenhouse-gas-emissions-from-energy-overview>; and from projection data from IEA, n. 52 above, p. 199.

Fourthly, having interpreted the duty of care as requiring a 45% emissions reduction by 2030 on a 2010 baseline, the Court decided, for obscure reasons, that the baseline for Shell should be 2019 rather than 2010.<sup>54</sup> Milieudéfensie had initially referred to a 2010 baseline in its Summons, but it subsequently amended its claims to suggest a 2019 baseline, on the ground that 2019 was the most recent year for which Shell had reported its CO<sub>2</sub> emissions data.<sup>55</sup> Yet, the fact that 2019 data is available does not mean that it is relevant in assessing Shell's duty of care. As Shell's emissions increased during the 2010s, a 2019 baseline allows the company to emit more by 2030 than if a 2010 baseline had been used. It is unclear how the Court came to the conclusion that a 2019 baseline 'sufficiently corresponds with the widely endorsed consensus that limiting global warming to 1.5°C requires a net reduction of 45% in global CO<sub>2</sub> emissions in 2030 relative to 2010'.<sup>56</sup>

These four inconsistencies undermine the credibility of the Court's assessment of Shell's mitigation duties. In fact, these observations may lead one to question whether it would be possible for a court properly to assess the requisite mitigation action of a corporation (or a state) based on global temperature targets.<sup>57</sup> Finally, the judgment gives no indication of the burden that this duty of care imposes on Shell: whether it imposes crippling costs on the group, or allows it to continue business as usual.<sup>58</sup>

## 5. AN ALTERNATIVE METHODOLOGY

Martti Koskeniemi makes a distinction between two types of reasoning in international law: 'descending reasoning', which infers norms from general principles that form the structure of international law; and 'ascending reasoning', which induces rules from general state practice.<sup>59</sup> He also shows a tension between these two types of reasoning: between 'utopian' arguments fuelled by deduction from general principles, and more 'apologetic' arguments based on ascending reasoning. The gap between these two types of reasoning is particularly wide with regard to climate change mitigation, a domain where states and observers almost unanimously recognize that far more needs to be done than is being done. Agreement on the ambitious 1.5–2°C targets, for instance, was not accompanied by commensurate national commitments,<sup>60</sup> let alone consistent corporate practices.

<sup>54</sup> *Milieudéfensie*, n. 1 above, para. 4.4.38.

<sup>55</sup> *Ibid.*, paras 35, 730, 742, 754, 852(1)–(2); *ibid.*, *Milieudéfensie*, Statement on the Record of Amendment of Claim, 21 Oct. 2020, para. 5, available at: <https://en.milieudéfensie.nl/news/statement-on-the-record-of.docx/@download/file/STATEMENT%20ON%20THE%20RECORD%20OF.docx>.

<sup>56</sup> *Milieudéfensie*, n. 1 above, para. 4.4.38.

<sup>57</sup> See discussion in Mayer, 'Temperature Targets', n. 46 above, pp. 593–5.

<sup>58</sup> The Court discusses the concept of proportionality to determine the need for mitigation action, but not to determine what can be expected from Shell in particular; see, e.g., *Milieudéfensie*, n. 1 above, para. 4.4.54. Following the judgment, Shell suggested that it could comply by 'taking some bold but measured steps'; see A. Raval, 'Shell To Speed Up Energy Transition Plan after Dutch Court Ruling', *Financial Times*, 9 June 2021, available at: <https://www.ft.com/content/878cb5cd-9814-4cb2-bbfb-c3f7b8927716>.

<sup>59</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2009), pp. 59–60.

<sup>60</sup> UN Environment Programme (UNEP), *Emissions Gap Report 2020* (UNEP, 2020), p. xix, available at: <https://www.unep.org/emissions-gap-report-2020>.

The Hague District Court has clearly a predilection for descending reasoning; it infers the content of Shell's mitigation obligation from international agreements and scientific reports, in isolation from any consideration for sectoral practices. The Court rightly dismisses the objection that if Shell reduces its operations another company will fill the void: Shell must comply with the law, notwithstanding what other companies do.<sup>61</sup> Yet, if no, or very few, companies actually practise the standard defined by the Court, this begs the question: can this standard really be identified by a court as the most likely content of an open-ended legal norm? By relying exclusively on descending reasoning and discarding relevant sectoral developments, the Court is arguably not merely interpreting the law as it is (*lex lata*) in the light of the standard of care generally accepted by society; rather, it is imposing its vision of the law as it should be (*lex ferenda*).

This approach is inconsistent with prevailing interpretations of the duty of care as relying in part on an ascending reasoning. The standard of care, in the Netherlands and elsewhere, is often interpreted by reference to an imaginary person, who is variously referred to as *bonus paterfamilias*,<sup>62</sup> 'the man on the Clapham omnibus',<sup>63</sup> or simply 'a normal'<sup>64</sup> or 'reasonable'<sup>65</sup> individual – namely, a person adopting an *ordinary* level of diligence.<sup>66</sup> While this standard can often be inferred from common sense, such inference must stand the test of consistency with social practices, as recognized in various legal traditions. In English law, Christian Witting characterizes the argument that the defendant 'conformed to the common practice of those engaged in the activity in question' as 'obviously ... relevant' to the interpretation of the standard of care.<sup>67</sup> In US law, the Second Restatement of Torts suggests that the standard of care must be determined by looking 'to a community standard'.<sup>68</sup> Civil law jurisdictions have interpreted statutory provisions in a similar manner,<sup>69</sup> including in the Netherlands, where

<sup>61</sup> *Milieudéfense*, n. 1 above, para. 4.4.49. But see DC The Hague, *Greenpeace v. The Netherlands*, 9 Dec. 2020, ECLI:NL:RBDHA:2020:12440, para. 4.6 (noting that imposing climate mitigation obligations on KLM Royal Dutch Airlines 'would put KLM in a worse position compared to its international competitors, to whom that condition will not apply').

<sup>62</sup> See, e.g., Cour de Cassation (Crim.), 27 Mar. 1973, Bull. Crim. 150/35, 72-91.435 (France).

<sup>63</sup> *McQuire v. Western Morning News Co* [1900–03] All ER Rep. 673, 675. See also *McFarlane v. Tayside Health Board* [1999] 3 WLR 1301 ('travellers on the London Underground').

<sup>64</sup> D. Espín, *Manual de Derecho Civil Español*, 2<sup>nd</sup> edn (Revista de Derecho Privado, 1961), vol. III, p. 479, cited in J. Limpens, R.M. Kruithof & A. Meinertzhagen-Limpens, 'The Notion of Tort', in K. Zweigert & U. Drobnig (eds), *International Encyclopedia of Comparative Law Online* (Springer, 1983), vol. XI, paras 2–24, available at: [http://dx.doi.org/10.1163/2589-4021\\_IECO\\_COM\\_1102TOC](http://dx.doi.org/10.1163/2589-4021_IECO_COM_1102TOC).

<sup>65</sup> American Law Institute, *Restatement (Second) of Torts* (1965), para. 283.

<sup>66</sup> O.W. Holmes, *The Common Law* (Little Brown, 1881), p. 108 ('a certain average of conduct'); V. Harpwood, *Modern Tort Law*, 7<sup>th</sup> edn (Routledge Cavendish, 2008), p. 129 ('average, reasonable man').

<sup>67</sup> C. Witting, *Street on Torts*, 15<sup>th</sup> edn (Oxford University Press, 2018), p. 127. See generally *Blyth v. Birmingham Waterworks Co* [1843–60] All ER Rep. 478, 497–80 ('reasonable man').

<sup>68</sup> American Law Institute, n. 65 above, para. 283.

<sup>69</sup> See H. Mazeaud et al., *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle*, 6<sup>th</sup> edn (Montchrestien, 1965), vol. I, p. 416 ('a prudent man'); H. de Page, *Traité Élémentaire de Droit Civil Belge*, 3<sup>rd</sup> edn (Bruylant, 1964), vol. II, p. 939 ('a careful, sensible person, who is prepared to take account of the risk of unfortunate consequences for others'); A. de Cupis, *Il Danno: Theoria Generale Della Responsabilità Civile*, 2<sup>nd</sup> edn (Giuffrè, 1966), vol. I, p. 116

the concept of ‘proper social conduct’ in Article 6:162(2) BW has been understood as pointing to the standard that ‘a reasonably acting person’ would follow in the same situation.<sup>70</sup> To interpret the standard of care, ‘it is necessary to compare the motorist with other motorists, the sportsman with other sportsmen, the doctor with other doctors, the solicitor with other solicitors’<sup>71</sup> – and, presumably, Shell with other oil-and-gas companies.

As such, the standard of care applicable to Shell depends not only on the content of international agreements and scientific reports about what ought to be done against climate change, but also on what could be expected from an average or reasonable company – the Clapham petrol station (or the multinational behind it). The conduct of such companies is the result of complex decision-making processes that courts cannot merely surmise. Rather, a good way of determining what may be expected from an average company would be to observe the common practices of similar companies. Accordingly, the case at issue could not be decided on reasonable bases without a review, albeit of a summary nature, of what other oil-and-gas corporations are doing (or not doing) with regard to climate change mitigation. In particular, the court would need to discuss the development of transnational initiatives aimed at reducing CO<sub>2</sub> emissions in oil-and-gas production – for instance, by reducing flaring<sup>72</sup> and methane leaks<sup>73</sup> – and to identify good practices from other companies.<sup>74</sup> Admittedly, ascending reasoning would not define a particularly clear-cut standard, and certainly not a very ambitious one. Many initiatives may be empty promises or instances where business interests overlap with mitigation action; these initiatives fall short of what would be necessary to achieve the 1.5–2°C targets.<sup>75</sup>

Closer scrutiny may suggest discrepancies in tort law between references to an ‘average man’ and to a more ‘prudent’ or ‘careful man’.<sup>76</sup> These discrepancies reflect the

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(‘individuals anxious to avoid mischievous results’); Y. Bu, *Chinese Civil Law* (Hart, 2013), p. 127 (‘a reasonably prudent member of the relevant social group in the same situation’); see also Espín, n. 64 above, vol. III, p. 479.

<sup>70</sup> W.H. van Boom, ‘Fault under Dutch Law’, in P. Widmer & C. Kissling (eds), *Unification of Tort Law: Fault* (Kluwer, 2005), pp. 167–78, at 173. See also I. Samoy, C. Borucki & A. Keirse, ‘The Role of Belgian and Dutch Tort Law in the Legal Battle against Damage as a Result of Smoking Behaviour’ (2019) 15(3) *Utrecht Law Review*, pp. 78–98, at 84 (‘a normal, reasonably prudent and forthrightful person placed in the same circumstances as the wrongdoer’).

<sup>71</sup> Limpens, Kruihof & Meinertzhagen-Limpens, n. 64 above, p. 25. See also F. Viney, *Le Bon Père de Famille et le Plerumque Fit: Contribution à l’Étude de la Distinction des Standards Normatifs et Descriptifs* (PhD thesis, University Paris 1 (France), defended on 12 Nov. 2013).

<sup>72</sup> See World Bank, ‘Zero Routine Flaring by 2030’, available at: <http://www.worldbank.org/en/programs/zero-routine-flaring-by-2030>.

<sup>73</sup> IEA, ‘Driving Down Methane Leaks from the Oil and Gas Industry: A Regulatory Roadmap and Toolkit’, Jan. 2021, available at: <https://www.iea.org/reports/driving-down-methane-leaks-from-the-oil-and-gas-industry>.

<sup>74</sup> See references at n. 29 above.

<sup>75</sup> See Oil Change International, ‘Big Oil Reality Check: Assessing Oil and Gas Company Climate Plans’, Sept. 2020, available at: <http://priceofoil.org/2020/09/23/big-oil-reality-check>; Carbon Tracker, ‘2 Degrees of Separation: Transition Risk for Oil and Gas in a Low Carbon World’, 21 June 2017, available at: <https://carbontransfer.wpengine.com/wp-content/uploads/2018/09/PRi-meth-paper-designed-8.pdf>.

<sup>76</sup> N. 64 above.

need to find a midpoint between ascending and descending reasoning: whereas an ‘average person’ standard suggests a purely ascending reasoning, a ‘careful person’ standard would allow a court to seek a middle ground between ascending and descending reasoning by imposing on a company a standard slightly more stringent than that commonly followed by the average company. The Court may even have to take into account the rapid evolution of the standard of care applicable to climate change mitigation: more efforts will probably be expected from an average or careful company in 2030 than is expected today. All in all, a legal analysis that relies also in part on an ascending reasoning could be more openly subjective, but also more consistent and, altogether, more convincing.

## 6. CONCLUSION

This case comment has argued that the Hague District Court’s innovative decision is not fully convincing. As in the *Urgenda* judgment, the Court struggles with the task of assessing an entity’s requisite mitigation action. Nothing in the judgment explains why the Court concludes that Shell must reduce its CO<sub>2</sub> emissions associated with its activities by 45% by 2030, compared with 2019, rather than, for instance, 25%<sup>77</sup> or 19%,<sup>78</sup> or compared with a 2010 baseline.<sup>79</sup> Arguably, the issue lies not just in the execution but also in the Court’s methodological choices, as neither international agreements nor climate science provide a sufficient basis to determine Shell’s requisite mitigation action. The case comment has outlined an alternative methodology based partly on an ascending reasoning, where the Court would seek to induce a standard of care from an observation of common practice in the relevant economic sector. Relying on ascending reasoning, in combination with descending reasoning, would be more consistent with the function of courts to apply the law, rather than to make the law.

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<sup>77</sup> N. 50 above.

<sup>78</sup> N. 53 above.

<sup>79</sup> Nn 54–56 above.