MILIEUDEFENSIE vs SHELL: DISCRIMINATION IS WRONG, EVEN AMONG MAJOR GREENHOUSE GAS EMITTERS

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*The Court of The Hague (Netherlands), with a milestone judgement, ordered Shell's parent company to significantly reduce its emissions. This decision represents the first imposition of a specific mitigation obligation on a wider audience than the traditional one. This outlines a new approach to the liability of private companies for the effects of climate change. In other words, this decision emphasises that private companies need to play their part in the climate fight by fulfilling international treaty provisions. The approach based on human rights, soft law and science in defining Shell's mitigation obligations has also confirmed the complementary (and necessary) role of the judiciary power in this matter.*

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# Contextualization

In order to fully appreciate the impact of this decision, a few fundamental elements should first be stressed. The starting point can only be that awareness of climate change is no longer confined to small sections of the world's population. Unfortunately, this collective awakening has come about more as a result of the emergence of the first effects of this process[[2]](#footnote-1) than due to an adequate and timely listening to the calls of science.[[3]](#footnote-2) Regardless of the causes, the correlation between human greenhouse gas (GHG) emissions and climate change is now accepted. Equally accepted, albeit subject to greater uncertainty related to the accuracy and the features of the models used, are the consequences of the various climate change scenarios.[[4]](#footnote-3) In the last years, in order to limit these changes (sometimes of catastrophic proportions), the international community has increased its efforts. The 2015 Paris Agreement[[5]](#footnote-4) and the recent Glasgow one[[6]](#footnote-5) are emblematic in this respect. However, they are also symptomatic of the deep and sometimes violent clash of interests surrounding the issue. The latter, in a nutshell, resulted in a international response that was at best inadequate and slow.[[7]](#footnote-6) The dissatisfaction resulting from this scenario has been increasingly channelled towards the courts. The results, however, have not been what was hoped for.

A turning point came with the so-called Urgenda case. With this latter, the Dutch courts first determined, and then confirmed at all levels of proceedings,[[8]](#footnote-7) the existence of a human rights-based obligation on the Dutch state to reduce its GHG emissions. The idea of a correlation between the determination of a defined standard of care, the invocation of international human rights law and other soft law mechanisms as well as scientific documentation has been a turning point and a model at global level. Together with the decision in the Leghari case in Pakistan,[[9]](#footnote-8) this gave rise to a new and dynamic line of case law. Yet, even in all this cases, the audience to exert influence on was still incomplete. As have been shown,[[10]](#footnote-9) there are private companies that have contributed (and continue to contribute) substantially to GHG emissions. Consequently, a public-private synergy is essential to develop a timely and effective solution. However, the difficulties related to standing, proof of harm and causation have been a formidable obstacle in litigation against private companies, leading to the failure of a whole season of claims for judicial protection in this respect.[[11]](#footnote-10) These attempts, however, should not be seen as prodromal to other future failures. The constantly changing social context and scientific knowledge are in fact being used by a second wave of litigation and the assumptions seem to be promising.[[12]](#footnote-11) Furthermore, the human rights-based approach developed in Urgenda, as mentioned above, represents a tipping point from a legal strategy point of view. Yet «*human rights-based climate litigation(s) in Europe (are) directed against a State. This is logical, as States are the subjects of international law with the primary responsibility to ensure the enjoyment of human rights to everyone residing within their jurisdiction. But States are not necessarily the only actors bearing responsibility for climate change, and thus climate litigation has also been undertaken against private actors.*»[[13]](#footnote-12) The latter consideration, however, lacked a judicial confirmation. In other words, until last May, what was missing was a groundbreaking ruling. The importance of the decision examined here emerges substantially.[[14]](#footnote-13)

# Case Summary

The summary of the case can be divided into two parts. In the first, the entire judgment should be summarised as briefly and clearly as possible. Only with this overview, albeit a very brief one, it will be possible to proceed to analyse the various relevant elements in detail.

On 26 May 2021, the Dutch district judge in The Hague upheld the claims of environmental organizations - including Vereniging Milieudefensie which gives its name to the case - and over 17000 Dutch citizens against Royal Dutch Shell (henceforth RDS), the head company of the Shell Group.[[15]](#footnote-14) The Court recognized the Anglo-Dutch oil giant’s substantial contribution to climate change leads to increased related risks. Accordingly, this lower court ruling requires RDS to significantly increase its efforts to prevent climate change by reducing its emissions by 45% by 2030 compared to 2019 levels. The Court imposed two obligations, one of results and one of best efforts, with respect to the reduction of emissions caused by the Shell Group, its supply chain and its consumers.[[16]](#footnote-15)

The effort to mitigate the effects of climate change by reducing emissions resulting from the 2015 Paris Agreement, therefore, affects both nation states and, according to this verdict, private companies as well. In other words, the greatest challenge ever faced by human beings requires the commitment of all.[[17]](#footnote-16)

As mentioned above, this ruling is part of a broader and heterogeneous stream of litigation on climate change that has developed worldwide in recent years.[[18]](#footnote-17) One of the reliable points within this fuzzy and unstable whole, which is still in a dynamic and controversial phase, seems to be the positions of the district judges of The Hague and, more generally, the Dutch ones.

The particular exposure of Dutch citizens to the threats outlined by climate change has in fact generated a high sensitivity of the Dutch courts on this issue. The position of Dutch judges had already been made clear in the notorious Urgenda case. In that case, the judges established that the Dutch state has a duty to act appropriately and ambitiously against climate change, as the consequences of climate change threaten to seriously harm also the human rights of its citizens.[[19]](#footnote-18)

More than a year after the final judgement of Urgenda, thanks to the same strategy,[[20]](#footnote-19) this duty, although only at the first judicial level, has also been recognized for a private company. The salient features of this case are many.

First of all, in determining the applicable jurisdiction, the Court upheld the plaintiffs' argument that RDS's drafting of the Shell Group's corporate policy constituted an independent source of damage under Article 7 of the Rome II Regulation.[[21]](#footnote-20) At the same time, the Dutch courts rejected RDS's objection that the emissions of CO2 constituted the event giving rise to damage.

The Court thus succeeded in emphasizing the global nature of the climate problem and, accordingly, the irrelevance of the location of greenhouse gas emissions.[[22]](#footnote-21) In addition, the constant reference to forecasts of particularly intense risks to the Netherlands allows for contextualization of the legal interests to be protected and, at the same time, limits them by focusing only on those of Dutch residents.[[23]](#footnote-22) A desire for global protection is thus decisively rejected.[[24]](#footnote-23)

The acceptance of the reconstruction presented by the plaintiffs, pursuant to the Rome II Regulation, leads to the application of Dutch law. The following step consists in the analysis of art. 6:162 Dutch Civil Code[[25]](#footnote-24) (which section deals with unlawful acts) and, more precisely, its unwritten standard of care.[[26]](#footnote-25) The latter is the legal basis used for prescribing emission reductions in this case. The Court took several elements into account when defining this standard of care. First of all, potential violations of Dutch citizens' human rights,[[27]](#footnote-26) as a result of climate change not mitigated by emission reductions, are raised. In particular, as in the Urgenda case, reference is made to Articles 2 and 8 of the European Convention on Human Rights,[[28]](#footnote-27) which respectively protect the right to life and respect for private and family life.[[29]](#footnote-28)

Secondly, the reference to the UN Guiding Principles as an interpretative criterion,[[30]](#footnote-29) notwithstanding its soft law nature, makes it possible to reinforce the existence of an obligation for private companies to respect human rights.[[31]](#footnote-30) A goal, as the Court points out, that the company itself declares as an integral part of its actions: «*We have the responsibility and commitment to respect human rights with a strong focus on how we interact with communities(....). We are committed to respecting human rights. Our human rights policy is informed by the UN Guiding Principles on Business and Human Rights and applies to all our employees and contractors.*»[[32]](#footnote-31)

Thirdly, the lack of actual harm (to date) does not prevent the defendant from incurring a duty of care. Scientific evidence has in fact clearly delineated the correlation between anthropogenic emissions and the worsening and - at this point - acceleration of climate change. As emphasized with respect to the Urgenda case,[[33]](#footnote-32) here too the use of the IPCC reports resolves a number of interpretative issues. The Court also reiterated that, to date, RDS is not in breach of its emission reduction obligation.[[34]](#footnote-33) Simultaneously, when analyzing the RDS policy for the Shell group, the Court concluded that there is an imminent breach of the obligation.[[35]](#footnote-34)

The difficulty and the corresponding importance of this decision lies in the extension of climate change mitigation obligations, arising from international treaties between states, to non-state actors. Hitherto, it had always been the states that were seen as the obligated parties of these obligations.[[36]](#footnote-35) The Court, however, acknowledged the crucial role of private actors in achieving the goals set out in international treaties and based on widely accepted scientific conclusion. The Court also noted that there is «*the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.*»[[37]](#footnote-36) It is precisely on these rights, more specifically the rights to life and private and family life, that the Court has found the legal basis to impose two obligations on Shell. These obligations derive not just from Shell's status as the group leader, but also from its consequent ability to exert a “einwirkungmoglickeit” on many others that orbit around it.[[38]](#footnote-37) This would create a broader effect on reducing emissions. On the one hand, therefore, RDS has an 'obligation of result' to reduce the emissions resulting from activities on Shell premises. On the other hand it has an 'obligation of best efforts' to reduce the emissions resulting from the production of the energy used by the Shell group, and the emissions resulting from Shell consumers using its products. These obligations, despite the fact that only Shell's conduct is taken into account in the judgement, do not seem to be limited to RDS.[[39]](#footnote-38) This also emerges from the analysis of a defendant's objection, rejected by the Court,[[40]](#footnote-39) that such emissions are, from a global market perspective, unavoidable. The Court, however, replied by outlining a general framework in which even the competitors of the Anglo-Dutch giant are bound to reduce emissions.[[41]](#footnote-40)

To sum up the reasoning of the Court Shell, and all other companies, should act in accordance with the Paris Agreement precisely because they must respect human rights too. In other words, given the relevance of the interests at stake and the urgency of the context, the fact that these private companies were not fully parties to the agreement significantly loses its relevance.

# Concluding Remarks

With this decision The Hague district judges take a further step in the judicial approach to climate change issues. They consolidate, in fact, a double paradigm shift. On the one hand, the key role of human rights and, on the other, the consolidation of the growing presence of the courts in the climate issue.

As pointed out by authoritative scholars,[[42]](#footnote-41) human rights serve as a filler to close the gaps left by international and national law. This is especially so from a liability perspective.

This further contribution made by Dutch case law to the global judicial debate on the subject presents clear elements of interest. It cannot be excluded that this decision, as happened previously with the Urgenda case, will be a source of inspiration for other judicial decisions.

Indeed, it should be stressed that the individual relevance of such a case within the climate challenge, however remarkable, *is limited and relative*. Whether this decision represents a real tipping point in the approach to climate issues will also depend on what other nations and other courts will do. However, on its own, this verdict may even make investments in the Netherlands less attractive in the short term.[[43]](#footnote-42) It is therefore not incredibly odd that, just a few months after this historical decision, the oil company changed its headquarters from the Netherlands to the UK.[[44]](#footnote-43)

Apart from this, the second trend confirmed by this judgement is the increasingly significant role of the courts with regard to climate issues. The positions on this topic are very articulated and variegated, not least because the species of climate litigation can hardly be reduced to a single type. However, the moments of connection are numerous and surprising.

For example, some critical remarks concerning a claim for compensation for past emissions by a Peruvian farmer against a German energy company pointed out the inadequacy of the tort liability instrument in this area.[[45]](#footnote-44) According to this perspective the function of civil liability should not only be compensatory but also deterrent. In other words, in addition to compensating the injured party, this branch of law should pursue another goal, namely it should encourage the adoption of ex ante due diligence measures or even limit harmful activity. It is argued that with respect to the consequences of past emissions, this second function of civil liability could not be developed and, therefore, it would not be appropriate to use this legal solution.[[46]](#footnote-45) The issue is certainly a complex one. Undoubtedly, the real point is to determine the timeframe and goals to be pursued. At the same time, the idea that it is «simply too late to prevent climate damage that has already occurred or is imminent in the near future»[[47]](#footnote-46) is not entirely correct. Similarly, the idea that climate cases lack the indispensable prerequisites for tort law to fulfil its deterrent function is not fully tenable.[[48]](#footnote-47) In this respect, it is sufficient to consider that, according to climate science, a substantial effort to reduce emissions by 2028 would increase the possibility of limiting the temperature rise to 1.5 degrees.[[49]](#footnote-48) This would avoid the more serious consequences that a 2-degree increase could determine. Thus future conduct over the next six years can undoubtedly play a significant role, both with respect to the onset of imminent damage and, not least, by reactivating the preventive effect of tort law. In this sense, almost paradoxically, judgments such as the Shell one are in fact legitimised by these critics. By questioning the use of liability as a tool to deal with damage from past emissions, these criticisms end up legitimising all those judicial interventions that take into account current and future emissions.

Other critical remarks, however, appear to be even more controversial. Consider, for example, the metaphorical concept of the drop in the ocean to describe the actual influence of individual contributions to the driving forces of climate change. According to this idea «*individual actors and their behaviour have no significant influence on the climate. Even if individual large emitters, (...) were to exit the market completely, the positive effect on the climate would be negligible. This applies to individuals and companies alike, and even to states.*»[[50]](#footnote-49) However, this assertion is contested, echoing the reasoning of the Urgenda case,[[51]](#footnote-50) in the Shell judgment. According to the courts «*[Shell’s] CO2 emissions only cause imminent environmental damage for Dutch residents in conjunction with other emissions of CO2 and other greenhouse gases […]. Not only are CO2 emitters held personally responsible for environmental damage in legal proceedings conducted all over the world, but also other parties that could influence CO2 emissions. The underlying thought is that every contribution towards a reduction of CO2 emissions may be of importance.*»[[52]](#footnote-51) The Court also responds to the possible - and specious[[53]](#footnote-52) - objections, according to which, on this basis, all emissions, regardless of significance, should be taken into account. However, to reject this remark the judges merely emphasise that the contribution to climate change must not be negligible.[[54]](#footnote-53) As mentioned above, such evaluations are possible and scientifically verified.[[55]](#footnote-54)

Some assessments of the impact on competitiveness are also controversial. This criticism is made regardless of the time frame of emissions. In other words, whether the emissions considered are past emissions or future emissions (as in the Shell case) the objection does not change. According to this position, charging such costs to "emitting" companies within a certain jurisdiction would put them at a huge disadvantage in global competition. Not just for the cost itself but also for the fact that national courts would have neither the competence nor the power to act in the same way against foreign emitters. This means that the possible charging of climate costs by the courts of a given country would lead to two phenomena. On the one hand, especially with respect to past emissions, a tax would (de facto) be imposed on the specific company that could not be avoided (or reduced).[[56]](#footnote-55) On the other hand, this attitude would probably lead to the emergence of the waterbed phenomenon. Indeed, «as water in a waterbed moves to the place where the least pressure is put on it»,[[57]](#footnote-56) so there will be a shift of emissions in favour of foreign companies or jurisdictions where climate protection is taken less seriously.[[58]](#footnote-57) This is, in fact, one of main Shell's objections. However, as mentioned above, the oil giant's comments were answered in the strongest possible terms. The Court, recalling that the global need to reduce emissions is not (and cannot be) questioned, makes it clear to RDS that it will not be alone in that process. Indeed, establishing the correlation among human rights, soft law mechanisms and science as a basis to determine the climate care standards of private companies means that other companies will also have to comply with this particular conformation of human rights. Otherwise there will be a Court ready to reaffirm the existence of this obligation. This means that the Court in the Shell case envisages a future where significant reductions in emissions, also thanks to the pressure exerted by the courts through a human rights approach, will characterise the whole market. According to the Court, this is also a response to the idea that companies «*will escape from (...) jurisdiction to States with less strict greenhouse gas reduction obligations, and with less activist courts (and that this kind of decisions) will only relocate the problem, and not solve it.*»[[59]](#footnote-58) The hope that can be read between the lines of the decision is that, given the seriousness of the problem and its consequences, a virtuous circle can be established to eradicate the problem at its root by nurturing a virtuous standard with respect to the obligations that private companies should also respect. If the standard were high and essentially homogeneous, it would be impossible to escape. As mentioned above, however, reality seems to have contradicted the Court's views, at least in this case.

If the objections raised by critics of the courts’ role are an integral, and ultimately constructive, part of the legal debate on climate issues, the less so are some considerations concerning the ideological roots of such activism. Labeling the phenomenon of climate litigation as a merely group of ethically motivated court decisions sounds reductive. It is not a question of devaluing democratic decision-making processes or sacrificing the separation of powers.[[60]](#footnote-59) As has been pointed out we are not facing the transition to a dikastocracy.[[61]](#footnote-60) Instead, it is important to emphasise the legal, social and scientific context in which the judiciary power is playing its role. Its efforts are undoubtedly improvable, but from a legal perspective they are not illegitimate.[[62]](#footnote-61) Moreover, the inactivity (or at best inadequate efforts) of states, the increasingly widespread perception and confrontation with the problems that will result from climate change, and the ever closer deadlines for effective action outlined by science are all elements that, in different ways, contribute to justify these efforts.

It is therefore not a question of substitution[[63]](#footnote-62) but of complementarity in the efforts towards the greatest challenge ever faced by mankind. Whether this will be sufficient or not will be determined only by time. What can be noticed here is that the Shell judgement has all the characteristics to enable an a little more optimistic outlook on the future.

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2. For a general overview Intergovernal Panel on Climate Change (IPCC), [Climate Change 2021: The Physical Science Basis](file:///C:\\Users\\annam\\AppData\\Local\\Temp\\Intergovernal%20Panel%20on%20Climate%20Change%20(IPCC),%20Climate%20Change%202021:%20The%20Physical%20Science%20Basis,%202021,%20p.%205%20ff), 2021, p. 5 ff. [↑](#footnote-ref-1)
3. The first scientific contributions in this sense date back to the 1960s and 1970s. It was these discovery that led to the 2021 Nobel Prize for Physics being awarded to Klaus Hasselmann and Syukuro Manabe. See. Nobel Prize Outreach, [Popular science background: They found hidden patterns in the climate and in other complex phenomena](https://www.nobelprize.org/prizes/physics/2021/popular-information/), Stockholm 2021; It should also be stressed that some private companies were aware of this phenomenon well before the end of the 1980s. A case in point is the internal report of the oil company Exxon, which already showed these correlations in the early 1980s. See Hall Shannon, Scientific American, [Exxon Knew about Climate Change almost 40 years ago](https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/), 2015; Shell itself, in a confidential report in 1988, recognised the effects of climate change and, among other things, the wave of litigation associated with it. See Shell Internationale Petroleum Maatschappij’s Health, Safety and Environment Division, [Report Series HSE 88-001 The Greenhouse Effect](https://biotech.law.lsu.edu/blog/Shell_Climate_1988.pdf),The Hague 1988, passim. Furthermore «(g)lobal carbon emissions from fossil fuels have significantly increased since 1900. Since 1970, CO2 emissions have increased by about 90%, with emissions from fossil fuel combustion and industrial processes contributing about 78% of the total greenhouse gas emissions increase from 1970 to 2011.» in United States Environmental Protection Agency (EPA), [Global Greenhouse Gas Emissions Data](https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data%20) (visited on: 28/11/2021). [↑](#footnote-ref-2)
4. «The Netherlands and Shell have both pointed out that there is still much scientific uncertainty about the exact consequences of climate change. As the Appeals Court had already noted in the Urgenda litigation, there is enough scientific certainty to conclude that there is a real threat of dangerous climate change, which is likely to constitute a risk even to the lives of the present generation of Dutch citizens.» in Spijkers Otto, Notes on Recent Developments: Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, in Chinese Journal of Environmental Law, 2021/5, p. 237 ff., p. 251. [↑](#footnote-ref-3)
5. United Nations, [Paris Agreeement to the United Nations Framework Convention on Climate Change](https://unfccc.int/sites/default/files/english_paris_agreement.pdf), Paris 2015. [↑](#footnote-ref-4)
6. United Nations, Glasgow Climate Pact, Glasgow 2021. [↑](#footnote-ref-5)
7. Maizland Lindsay, [Council on Foreign Relations, ‘Global Climate Agreements: Successes and Failures’](https://www.cfr.org/backgrounder/paris-global-climate-change-agreements), 2021 (visited on November 25 2021); Abate Randall, Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources, Cambridge 2020, p. 6 ff. [↑](#footnote-ref-6)
8. Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment), [ECLI:NL:RBDHA:2015:7196](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196) (The Hague District Court 2015); The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation, [ECLI:NL:GHDHA:2018:2591](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610) (The Hague Court of Appeal 2018); The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda, [ECLI:NL:HR:2019:2006](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007) (Dutch Supreme Court 2019). [↑](#footnote-ref-7)
9. Asghar Leghari vs Federation of Pakistan, [W.P. No. 25501/2015](https://sys.lhc.gov.pk/appjudgments/2018LHC132.pdf) (Lahore High Court Lahore). [↑](#footnote-ref-8)
10. Climate Accountability Institute, [Update of Carbon Majors 1965-2018](https://climateaccountability.org/pdf/CAI%20PressRelease%20Dec20.pdf), Snowpass (USA) 2020. [↑](#footnote-ref-9)
11. Ganguly Geetanjali/Setzer Joana/ Heyvaert Veerle, If at First You Don’t Succeed: Suing Corporations for Climate Change, in Oxford Journal of Legal Studies, 2018/4, p. 841 ff., p. 846. [↑](#footnote-ref-10)
12. Ganguly/Setzer/Heyvaert (Fn. 10), p. 849 ff. [↑](#footnote-ref-11)
13. Spijkers (Fn. 3), p. 240. [↑](#footnote-ref-12)
14. Macchi Chiara/Van Zeben Josephine, Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell, in Review of European, Comparative and International Environmental Law 2021/30, p. 409 ff., p. 410. [↑](#footnote-ref-13)
15. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021). [↑](#footnote-ref-14)
16. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 5.3. [↑](#footnote-ref-15)
17. Cfr. Barrau Aurelien, Le plus grand défi de l'histoire de l'humanité, Neuilly-sur-Seine Cedex, 2019; De Cesco Andrea Federico, [Cingolani e la transizione ecologica: «Dobbiamo pensare ai nostri figli non alle ideologie»](https://www.corriere.it/pianeta2020/21_giugno_04/cingolani-la-transizione-ecologica-piu-grande-sfida-che-l-umanita-dovra-affrontare-bd9b8490-c51b-11eb-86af-ac042f3197d2.shtml), in: Corriere della Sera of June 4, 2020. [↑](#footnote-ref-16)
18. United Nations, [Global Climate Litigation Report 2020 status review](https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y), 2020, p. 9 ff. [↑](#footnote-ref-17)
19. Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment), [ECLI:NL:RBDHA:2015:7196](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196)  (The Hague District Court 2015) para 2.8 ff. and 4.64 ff. [↑](#footnote-ref-18)
20. «Friends of the Earth Netherlands was thus following the legal strategy used in Urgenda discussed above. This was no coincidence, as the lead counsel – Roger Cox – was the same person in both cases.» in Spijkers (Fn. 3), p. 244. [↑](#footnote-ref-19)
21. European Parliament/ Council of Europe, Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), Brussels 2007. [↑](#footnote-ref-20)
22. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 4.3.5-4.3.6-4.3.7. [↑](#footnote-ref-21)
23. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 2.3.9, 4.2.5, 4.4.6. [↑](#footnote-ref-22)
24. Spijkers (Fn. 3), p. 244; Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021) para 4.2.1–6, 4.4.34. [↑](#footnote-ref-23)
25. Art. 6:162, [Dutch Civil Code](https://wetten.overheid.nl/BWBR0005289/2020-07-01/" \l "Boek6_Titeldeel3_Afdeling1_Artikel162). [↑](#footnote-ref-24)
26. «Interestingly, the Court found that Shell was acting unlawfully, even though it did not find a single specific provision of domestic or international law that Shell had breached.(...) Under Dutch private law, a company can be held liable not just when it acts contrary to a specific legal rule, but also when it acts contrary to a societal standard of due care or ‘proper social conduct’ (...). This standard of due care can even be filled in by laws and regulations which, formally speaking, are not binding on Shell, such as the Climate Agreement and the European Convention on Human Rights (ECHR). Even though Shell was not bound by any of these legal instruments, the Court felt that they could nonetheless be used to determine whether Shell adhered to the unwritten standard of due care.» in Spijkers (Fn. 3), p. 244. [↑](#footnote-ref-25)
27. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021) para 4.4.9. [↑](#footnote-ref-26)
28. Council of Europe, [European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 15,](https://www.echr.coe.int/documents/convention_eng.pdf) Brussels 2021. [↑](#footnote-ref-27)
29. Macchi/Van Zeben (Fn.13), p. 413 ff. [↑](#footnote-ref-28)
30. Macchi/Van Zeben (Fn.13), p. 412 ff. [↑](#footnote-ref-29)
31. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), paras 4.4.13–4.4.15. [↑](#footnote-ref-30)
32. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021). [↑](#footnote-ref-31)
33. Bakker Christine, Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond, in Alogna Ivano/Bakker Christine/Gauci Jean-Pierre (eds.), Climate Change Litigation: Global Perspectives, 1. Ed., Leiden, 2021, p. 200 ff. [↑](#footnote-ref-32)
34. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 4.5.8. [↑](#footnote-ref-33)
35. Ivi [↑](#footnote-ref-34)
36. «Through this approach, the legal impact of the Paris Agreement reaches well beyond its bottom-up mitigation regime, structured around Nationally Determined Contributions. The Agreement’s general goals have guided the Dutch court’s interpretation in a way that has significant, if not downright radical, implications for Shell’s legal liability.» in Yamineva Yulia, CCEEL blog, [Shell-shocked: a watershed moment for climate litigation against fossil fuel companies](https://sites.uef.fi/cceel/shell-shocked-a-watershed-moment-for-climate-litigation-against-fossil-fuel-companies/%20), 2021, (visited on: December 15 2021). [↑](#footnote-ref-35)
37. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 4.1.3. [↑](#footnote-ref-36)
38. For further considerations Macchi/Van Zeben (Fn.13), p. 414. [↑](#footnote-ref-37)
39. «The responsibility of business enterprises to respect human rights, (...) is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Therefore, it is not enough for companies to monitor developments and follow the measures States take; they have an individual responsibility.(...) it is universally endorsed that companies must respect human rights. (...) This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate. (...) It is not an optional responsibility for companies. It applies everywhere, regardless of the local legal context, and is not passive (…) it requires action on the part of businesses.» in Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 4.4.13–4.4.15; Furthermore «(t)his position seems to have attracted the support of the Dutch Government. When the Netherlands’ Minister and State Secretary of Economic Affairs and Climate were jointly asked about the consequences of the Shell ruling, both worldwide and in the Netherlands, they gave the following reply: It concerns a lawsuit between Milieudefensie et al and Royal Dutch Shell. The reduction obligation imposed by the court only applies to Shell. However, the court states in its judgment that the responsibility to respect human rights is not only for Shell but applies to all companies.» in Spijkers (Fn. 3), p. 250. [↑](#footnote-ref-38)
40. An overview of Shell's objections and defences, which were rejected by the Court, can be found in Spijkers (Fn. 3), p. 248 ff. [↑](#footnote-ref-39)
41. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 4.4.49 4.4.50. [↑](#footnote-ref-40)
42. Savaresi Annalisa, Plugging the enforcement gap: The rise and rise of human rights in climate change litigation, in: [Questions of International Law (QIL-QDI), 2021/77](http://www.qil-qdi.org/plugging-the-enforcement-gap-the-rise-and-rise-of-human-rights-in-climate-change-litigation/), p.1 ff., passim; For a critical view of this approach see Mayer Benoit, Climate Change Mitigation as an Obligation under Human Rights Treaties?, in: American Journal of International Law, 2021/115, p. 409 ff., passim. [↑](#footnote-ref-41)
43. Spijkers (Fn. 3), p. 251. [↑](#footnote-ref-42)
44. Nasralla Shadia/Ravikumar Sachin, Reuters, [Shell ditches the Dutch, seeks move to London in overhaul](https://www.reuters.com/world/uk/shell-proposes-single-share-structure-tax-residence-uk-2021-11-15/), London 2021, (visited on: November 30, 2021); The bizarre coincidence is also reported by Spijkers (Fn. 3), p. 249. [↑](#footnote-ref-43)
45. In particular, reference is made here to certain critical remarks raised by Wagner Gerhard, Klimahaftung vor Gericht, München 2020, p. 111 ff. [↑](#footnote-ref-44)
46. Wagner (Fn. 44), p. 118 ff. [↑](#footnote-ref-45)
47. Wagner (Fn. 44), p.119. [↑](#footnote-ref-46)
48. «Global climate change and the threat of climate damage according to today's climate research could not have been predicted a hundred years ago» in Wagner (Fn. 44), p. 232. This statements does not seem entirely conclusive. Please cfr. Fn. 2. [↑](#footnote-ref-47)
49. Mercator Research Institute on Global Commons and Climate Change, [That’s how fast the carbon clock is ticking](https://www.mcc-berlin.net/en/research/co2-budget.html). [↑](#footnote-ref-48)
50. Wagner (Fn. 44), p. 112. [↑](#footnote-ref-49)
51. The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda, ECLI:NL:HR:2019:2006, (Dutch Supreme Court 2019), para 5.7.7. [↑](#footnote-ref-50)
52. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), para 4.3.5. [↑](#footnote-ref-51)
53. Spijkers (Fn. 3), p. 249. [↑](#footnote-ref-52)
54. Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, [ECLI:NL:RBDHA:2021:5339](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339) ( The Hague District Court 2021), paras 4.4.16-4.4.37. [↑](#footnote-ref-53)
55. Please cfr. Fn. 9. [↑](#footnote-ref-54)
56. Wagner (Fn. 44), p. 120. [↑](#footnote-ref-55)
57. Spijkers (Fn. 3), p. 249. [↑](#footnote-ref-56)
58. Wagner (Fn. 44), p. 121. [↑](#footnote-ref-57)
59. Spijkers (Fn. 3), p. 249. [↑](#footnote-ref-58)
60. Wagner (Fn. 44), p. 119-120. [↑](#footnote-ref-59)
61. Spijkers (Fn. 3), p. 254. [↑](#footnote-ref-60)
62. Burgers Laura, Should Judges Make Climate Change Law?, in: Transnational Environmental Law, 2020/9, p. 55 ff., passim. [↑](#footnote-ref-61)
63. Wagner (Fn. 44), p.113. [↑](#footnote-ref-62)