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Soft law contribution to mitigate climate change: an analysis of the Milieudefensie case

Contribuição da soft law para mitigar as mudanças climáticas: uma análise do caso Milieudefensie

Tiago Matsuoka Megale

Alberto do Amaral Júnior

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Sumário

CRÔNICA	11
SHOULD NON-EUROPEAN UNION MEMBER STATES BE CAUTIOUS ABOUT THE E.U CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE?	13
Nitish Monebhurrun	
EVENTOS DE DIREITO INTERNACIONAL.....	15
INOVAÇÕES NO REGIME JURÍDICO DE DEVERES E RESPONSABILIDADES DAS EMPRESAS MULTINA- CIONAIS NUMA PERSPECTIVA INTERNACIONAL E COMPARADA.....	17
Chierly Hayashida, Isabel de Ávila Torres e Laura Gadioli Lopes	
VIII CONGRESSO DO INSTITUTO BRASILEIRO DE DIREITO DO MAR	23
André de Paiva Toledo	
O DIREITO INTERNACIONAL NA ATUALIDADE CULTURAL E ARTÍSTICA / INTERNATIO- NAL LAW IN CULTURE AND ARTS	25
THE GHOSTS IN OUR PRODUCTS: SLAVE LABOR IN BRAZIL PORTRAYED IN RENATO BARBIERI'S DOCUMENTARY 'SERVIDÃO'	27
Nitish Monebhurrun	
INTERNATIONAL LAW FOOD	31
MUDANÇAS CLIMÁTICAS, UVA E VINHO: O QUE O DIREITO TEM A DIZER?	33
Marcílio Toscano Franca Filho e Gabriel Burjaili de Oliveira	
DIREITO À ALIMENTAÇÃO E RESPONSABILIDADE INTERNACIONAL ALÉM DO ESTADO.....	50
Thayanne Borges Estelita	

A DIMENSÃO INTERNACIONAL DO DIREITO HUMANO À ALIMENTAÇÃO ADEQUADA E A POSSIBILIDADE DE RESPONSABILIZAÇÃO DO ESTADO BRASILEIRO: O RETORNO DO BRASIL AO MAPA MUNDIAL DA FOME..... 71

Maria Luiza Pereira de Alencar Mayer Feitosa, Victor A. M. F. Ventura e Eduardo Pitrez de Aguiar Corrêa

SISTEMA NUTRI-SCORE: MODELO PORTUGUÊS COMO INSTRUMENTO JURÍDICO GARANTIDOR DO DIREITO HUMANO À ALIMENTAÇÃO ADEQUADA.....97

Érica Valente Lopes e Tarin Cristino Frota Mont'Alverne

FRAGILE PILLARS OF FOOD SECURITY: EXPLORING THE CHALLENGES OF AVAILABILITY, ACCESSIBILITY, AND QUALITY FOR GLOBAL FOOD REGIME 115

Ipsita Ray e Anshuman Shukla

ADMINISTRATIVE AND ENVIRONMENTAL CONTROL OF MEDITERRANEAN FISHERY 130

Oscar Expósito-López e Josep Ramon Fuentes i Gasó

SOFT LAW AS A DECOLONIAL AND TRANSNORMATIVE TOOL: A DEBATE BASED ON THE ZERO HUNGER PROGRAM 149

Tatiana Cardoso Squeff

ARTIGOS SOBRE OUTROS TEMAS 173

PROBLEMAS E DISTINÇÕES RELATIVOS À JURISDIÇÃO, ADMISSIBILIDADE E DIREITO APLICÁVEL EM TRIBUNAIS INTERNACIONAIS 175

Lucas Carlos Lima

SOFT LAW CONTRIBUTION TO MITIGATE CLIMATE CHANGE: AN ANALYSIS OF THE MILIEUDEFENSIE CASE..... 203

Tiago Matsuoka Megale e Alberto do Amaral Júnior

A EPISTEMOLOGIA DA AUTODETERMINAÇÃO NA ORGANIZAÇÃO DAS NAÇÕES UNIDAS: TENSIONAMENTOS DO MODELO VIGENTE 222

Adriano Smolarek e João Irineu de Resende Miranda

BARREIRAS LINGUÍSTICAS NO DIREITO INTERNACIONAL: UM FATOR DE DESIGUALDADE ENTRE O NORTE E O SUL GLOBAL 242

Fabício José Rodrigues de Lemos

DECOLONIAL PERSPECTIVES ON THE NORMATIVITY OF CIVILIZING DISCOURSES AND THE METAPHOR OF HUMAN RIGHTS.....	259
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Antonio Carlos Wolkmer e Débora Ferrazzo

THE CONCEPT OF THE FOURTH GENERATION OF HUMAN RIGHTS: FACT OR PERSPECTIVE OF SCIENTIFIC DISCOURSE	280
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Serhii Perepolkin, Valentyna Boniak, Inna Yefimova, Liliia Labenska e Dmytro Treskin

Soft law contribution to mitigate climate change: an analysis of the Milieudéfense case*

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Tiago Matsuoka Megale**

Alberto do Amaral Júnior***

Abstract

Climate litigation currently backs the development of international climate change law and the reaction to the phenomenon. In the analysis of the Milieudéfense case, this paper aims to analyze whether the interpretation of the United Nations Guiding Principles (UNGP) by the Hague district court contributes to Shell punishment relative to its CO2 emissions. The methodology adopted consists of the case study of the Milieudéfense case complemented by bibliographic and documentary research techniques. In the analyzed case, the aforementioned court interpreted Royal Dutch Shell (RDS) measures to identify and evaluate the adverse effects of its emissions in light of the UNGP principles that encompass the responsibility to respect human rights and the actions to accomplish this responsibility. Moreover, the court recommended companies to adopt adequate measures according to the UNGP principle that disciplines enterprises' effective integration of findings from their impact assessments and the need to take appropriate action. Additional parameters to RDS condemnation are hard law instruments such as international human rights treaties and soft law instruments such as the SDGs. The conclusions reveal that the analyzed decision reinforces RDS responsibilities established in the UNGP, which are not legally binding. This development demonstrates that effective climate change policy hinges on substantial private action and that climate litigation contributes to overcome the current slow and arguably ineffective nature of international interstate action on the climate issue. The originality consists of the analysis of the way in which the argumentation in the Milieudéfense case hardens international soft law that disciplines corporate behavior.

Keywords: UNGP; soft law; climate change; climate litigation.

Resumo

Os litígios climáticos atualmente apoiam o desenvolvimento da regulamentação internacional sobre mudanças climáticas e a reação ao fenômeno. Na análise do caso Milieudéfense, este artigo tem como objetivo analisar se a interpretação dos Princípios Orientadores das Nações Unidas (UNGP) pelo Tribunal distrital de Haia contribui para a sanção da Shell em relação às suas

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** Doutorando em direito do comércio internacional na FDUSP. Mestre em direito do comércio internacional na FDUSP. Mestre em Administração Internacional na Escola de Administração de Empresas da Fundação Getúlio Vargas (FGV/EAESP). Graduado em direito pela FDUSP. Foi pesquisador visitante no Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.
E-mail: tiago.ms.megale@gmail.com

*** Livre Docente em Direito pela Universidade de São Paulo. Professor associado no Departamento de Direito Internacional e Comparado da Faculdade de Direito da Universidade de São Paulo.
E-mail: aamaralj@uol.com.br

emissões de CO₂. A metodologia adotada consiste no estudo do caso Milieudéfensie complementado por técnicas de pesquisa bibliográfica e documental. No caso analisado, o referido Tribunal interpretou as medidas da Royal Dutch Shell (RDS) para identificar e avaliar os efeitos adversos de suas emissões à luz dos princípios do UNGP que englobam a responsabilidade de respeitar os direitos humanos e as ações para cumprir essa responsabilidade. Além disso, o Tribunal recomendou que as empresas adotassem medidas adequadas de acordo com o princípio UNGP que estabelece a integração efetiva, por parte das empresas, dos resultados de suas avaliações de impacto e a necessidade de tomar as medidas apropriadas. Outros parâmetros para a condenação da RDS são os instrumentos de hard law, como os tratados internacionais de direitos humanos, e os instrumentos de soft law, como os SDGs. As conclusões revelam que a decisão analisada reforça as responsabilidades de RDS estabelecidas no UNGP, que não são juridicamente vinculantes. Esse desenvolvimento demonstra que uma política eficaz de mudança climática depende de ações privadas substanciais e que o litígio climático contribui para superar a atual natureza lenta e possivelmente ineficaz da ação interestadual internacional sobre a questão climática. A originalidade consiste na análise da maneira pela qual a argumentação no caso Milieudéfensie endurece a soft law internacional que regula o comportamento corporativo.

Palavras-chave: UNGP; soft law; mudança climática; litígio climático.

1 Introduction

Limited results have recently been achieved in regards to facing the global climate crisis. Facts that demonstrate the continuity of climate change are the increase in temperature around the world above what had been predicted, the melting of glaciers, rising sea levels and increasingly recurring extreme events such as heat waves and torrential rains. In face of this international scenario, this paper moves back to the domestic level in order to identify how climate change is being addressed and lately to analyze the paths that were taken. In other words, given the insufficiency of state actions, climate litigation emerges as a means to implement commitments

made.¹ Domestic litigation is playing a growing role in the development of the international climate change law and more generally in the promotion of action on climate change.² Following the adoption of more ambitious international agreements, some municipal courts have come to feel more confident in recognizing the obligation of national authorities and private actors to comply with relevant obligations.³

The potential inherent to climate litigation is analyzed in the literature. Climate litigation aims to promote actions to control and reduce anthropogenic emissions of greenhouse gases, and other measures to contain climate change.⁴ Through the jurisdictional route, public and private actors (national and international) who significantly emit (or allow) these polluting gases would be held responsible and/or constrained to adopt more active behaviors to achieve the global commitment to reducing climate change.⁵

The delimitation of this paper will fall on the Milieudéfensie case decided in the Netherlands because it firstly reflects a general trend of increased scrutiny of environmental impacts of the activities of multinationals and other corporations.⁶ Secondly, it represents a continuity of a body of case-law based on the Urgenda decisions⁷ and connected cases that arose in other juris-

¹ PIRES, Julia Stefanello; PAMPLONA, Danielle Anne. Perspectivas da litigância climática em face de empresas: o caso Milieudéfensie *et al.* vs. Royal Dutch Shell. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 145-163, 2022. p. 147.

² MAYER, Benoit. *The International Law on Climate Change*. New York: Cambridge University Press, 2018. p. 248.

³ MAYER, Benoit. *The International Law on Climate Change*. New York: Cambridge University Press, 2018. p. 248.

⁴ CARVALHO, Délton Winter de; BARBOSA, Kelly de Souza. Litigância climática como estratégia jurisdicional ao aquecimento global antropogênico e mudanças climáticas. *Revista de Direito Internacional*, Brasília, v. 16, n. 2, p. 54-72, 2019. p. 63.

⁵ CARVALHO, Délton Winter de; BARBOSA, Kelly de Souza. Litigância climática como estratégia jurisdicional ao aquecimento global antropogênico e mudanças climáticas. *Revista de Direito Internacional*, Brasília, v. 16, n. 2, p. 54-72, 2019. p. 63.

⁶ MACCHI, Chiara; VAN ZEBEN, Josephine. Business and human rights implications of climate change litigation: Milieudéfensie *et al.* v Royal Dutch Shell. *Review of European, Comparative and International Environmental Law*, v. 30, p. 409-415, 2021. p. 410.

⁷ The Urgenda rulings refer to a set of decisions in which the Urgenda Foundation, a Dutch environmental entity, faced the Dutch government to demand from it a more proactive conduct to fight global climate change. In brief, in the first decision, the Hague District Court ordered the Dutch State to reduce GHG emissions to 25% below 1990 levels by 2020 founded on the insufficient Dutch pledge to lower emissions by 17% to comply with the State's contribution toward the Paris Agreement objective of limiting global tem-

dictions. There are features of this case that are specific to the Dutch legal system – such as the construction of the tort-based duty of care foreseen on Book 6, Section 162 of the Dutch Civil Code and the type of class actions that can be brought.⁸ In the analysis of specific elements of the Milieudéfensie case, this paper aims to answer the following question: can the interpretation of the United Nations Guiding Principles (UNGP) by the Hague district court contribute to the punishment of Shell that leads it to change its behavior? The case will be analyzed from the perspective of the consideration that the court has given to the UNGP, because it inserted them in the interpretation of RDS' standard of care and attributed to them the status of an authoritative and internationally endorsed soft law tool, which prescribes the responsibilities of businesses relative to human rights. For the sake of clarity, the expression soft law refers to instruments or provisions that are not legally binding, but important inside the broad framework of international law creation. On the contrary, hard law consists of legal obligations that bind the parties inserted in a legal bond. As will be further analyzed on part 3, this case shows how climate litigation can stimulate the 'hardening' of international soft law in regards to standards of corporate behavior.

In the development of the ideas to answer the proposed question, the paper firstly explains the main features of the UNGP and its mission. In sequence, it analyzes the UNGP's interpretation in Milieudéfensie case. The UNGP constituted a guideline to the interpretation of Royal Dutch Shell (RDS)' standard of care. Principle 11 and principle 13 of the UNGP contributed to the court's analysis of RDS' actions to identify and assess the negative effects of its emissions. Principle 19

perature increases to two degrees Celsius above pre-industrial levels and on the State duty to adopt mitigation measures to tackle climate change. The Dutch government then appealed and was followed by a ruling issued by the Hague Court of Appeal, which upheld the District Court's decision, reaching the conclusion that the failure to diminish greenhouse gas emissions by at least 25% until the end of 2020 implies an unlawful act by the Dutch State in violation of its duty of care foreseen on articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that foresee respectively the right to life and the right to respect for private and family life. Once more, the Dutch government filed an appeal and, on December 2019, the Dutch Supreme Court upheld the previous ruling based on ECHR articles 2 and 8.

⁸ MACCHI, Chiara; VAN ZEBEN, Josephine. Business and human rights implications of climate change litigation: Milieudéfensie *et al.* v Royal Dutch Shell. *Review of European, Comparative and International Environmental Law*, v. 30, p. 409-415, 2021. p. 409.

of the UNGP was the basis of the recommendation by the court for companies to take appropriate action. Then, additional reasons for the condemnation of RDS are analyzed together with legal tools that served as parameters, namely international human rights treaties and the Sustainable Development Goals (SDGs). The methodology adopted consists of the case study of the aforementioned case complemented by bibliographic and documentary research techniques. They comprise respectively peer reviewed papers published in journals and procedural documents of the Milieudéfensie case that are publicly available.

2 Core elements of the UNGP

Before moving to the content and application of the UNGP, their position inside public international law is analyzed. The UNGP were endorsed by the United Nations Human Rights Council in 2011. This represented two achievements as it was the first authoritative guidance the Council had ever issued on how to meet the complex global challenges of business and human rights; and it also was the first time that the Council or its predecessor, the Commission on Human Rights, had ever endorsed a normative text on any subject that governments did not negotiate themselves.⁹ Thus, there is now a common platform on which to build and authoritative benchmarks against which progress can be assessed.¹⁰

Further action was also taken by the Human Rights Council. Following its endorsement of the Guiding Principles, the Human Rights Council established a Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group), requesting it, in part, to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.¹¹ In this regard,

⁹ RUGGIE, John. Progress in Corporate Accountability. *IHRB*, 4 Feb. 2013. Available at: <https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability>. Access on: 26 Nov. 2023.

¹⁰ RUGGIE, John. Progress in Corporate Accountability. *IHRB*, 4 Feb. 2013. Available at: <https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability>. Access on: 26 Nov. 2023.

¹¹ WOODS, Cindy. Engaging the U.N. Guiding Principles on Business and Human Rights: the Inter-American Commission on Human Rights and the extractive sector. *Revista de Direito Internacional*,

the Working Group has encouraged all States to develop and enact National Action Plans, fluid policy strategies aimed at preventing corporate human rights abuses through the promotion of the Guiding Principles.¹² The Working Group and a number of civil society organizations have developed guidance on the development of the plans, being one essential criterion for the creation of an effective plan the meaningful involvement of interested stakeholders in an inclusive and transparent process.¹³

The action of the Human Rights Council reflects a change in international law creation. The recognition of international organizations as subjects of public international law remodeled the process of normative production in international law.¹⁴ Currently, a large part of the international normative production is carried out by international organizations which, through recommendations, final acts, programs or action plans, among others, have impacted the traditional model of production of international law as recommended by article 38 of the statute of International Court of Justice.¹⁵ The means of production of contemporary international law challenge the absence of express consent from the State — the traditional production model of this legal branch.¹⁶

On the other hand, the drafter of the UNGP, John Ruggie, recognizes that additional moves are necessary. More granular work would be required in order for governments, businesses and other stakeholders to turn the GPs into rules and tools for specific industry sectors and operating contexts, different scales of ope-

rations, various forms of financial intermediaries, and so on.¹⁷ This would include legal measures designed as precision instruments and not some idealized global command-and-control regulatory regime.¹⁸

Negative criticisms also targeted the UNGP. A central criticism refers to gaps that will prevent the Guiding Principles from effectively advancing corporate responsibility and accountability for human rights and so may fail to gain widespread acceptance by civil society.¹⁹ For example, the draft Guiding Principles lack a clear guidance in regards to how States and companies should cope with the issue of persons in vulnerable conditions such as women, children and indigenous peoples. Clear guidance should be provided by drawing from recommendations made by other UN Special Procedures, UN human rights treaty bodies, the UN Permanent Forum on Indigenous Issues, and the International Labor Organization.²⁰ Further, explicit reference to relevant treaties and declarations should be included in the Guiding Principles when articulating the sources of internationally recognized human rights that companies must respect.²¹ These can encompass essential human rights treaties, namely the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of Persons with Disabilities, as well as worldwide recognized labor standards, such as the ILO Indigenous and Tribal Peoples Convention 169.

Criticisms to the UNGP second pillar that encompasses the corporate responsibility to respect and was

Brasília, v. 12, n. 2, p. 570-588, 2015. p. 574.

¹² WOODS, Cindy. Engaging the U.N. Guiding Principles on Business and Human Rights: the Inter-American Commission on Human Rights and the extractive sector. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 570-588, 2015. p. 574.

¹³ WOODS, Cindy. Engaging the U.N. Guiding Principles on Business and Human Rights: the Inter-American Commission on Human Rights and the extractive sector. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 570-588, 2015. p. 574.

¹⁴ GUERRA, Amina Welten. Os atributos da norma jurídica aplicados ao modelo de produção tradicional do direito internacional e o debate sobre a soft law. *Revista de Direito Internacional*, Brasília, v. 20, n. 2, p. 176-191, 2023. p. 186.

¹⁵ GUERRA, Amina Welten. Os atributos da norma jurídica aplicados ao modelo de produção tradicional do direito internacional e o debate sobre a soft law. *Revista de Direito Internacional*, Brasília, v. 20, n. 2, p. 176-191, 2023. p. 177.

¹⁶ GUERRA, Amina Welten. Os atributos da norma jurídica aplicados ao modelo de produção tradicional do direito internacional e o debate sobre a soft law. *Revista de Direito Internacional*, Brasília, v. 20, n. 2, p. 176-191, 2023. p. 187.

¹⁷ RUGGIE, John. Progress in Corporate Accountability. *IHRB*, 4 Feb. 2013. Available at: <https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability>. Access on: 26 Nov. 2023.

¹⁸ RUGGIE, John. Progress in Corporate Accountability. *IHRB*, 4 Feb. 2013. Available at: <https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability>. Access on: 26 Nov. 2023.

¹⁹ AMNESTY INTERNATIONAL *et al.* Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights. *FIDH*, Jan. 2011. Available at: https://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf. Access on: 26 Nov. 2023.

²⁰ AMNESTY INTERNATIONAL *et al.* Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights. *FIDH*, Jan. 2011. Available at: https://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf. Access on: 26 Nov. 2023.

²¹ AMNESTY INTERNATIONAL *et al.* Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights. *FIDH*, Jan. 2011. Available at: https://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf. Access on: 26 Nov. 2023.

analyzed in the Milieudefensie case were also presented. It is debatable if the second pillar gathers existing international norms because there are no international norms (hard law) directed towards corporations, whether in treaties or customary international law.²² Therefore, it could be argued that the corporate responsibility to respect does not have the same legal status as the norms recognized in the first and third pillars.²³ In fact, Ruggie did not claim legal authority for pillar two; rather he said it was based on social expectations of business and the social license to operate.²⁴

The UNGP are structured in a framework that reaches States and business enterprises. States must respect, protect and fulfill human rights. While, under the duty to respect human rights, States have a negative obligation to refrain from interfering with the enjoyment of any human rights, the duty to protect and the duty to fulfill human rights are of a positive nature, which means that this duty imposes requirements for a standard of conduct.²⁵ In further details, implementing the UNGP allows for States consolidated efforts to prevent and mitigate human rights abuses in business operations; greater awareness of laws and regulations (or gaps in such) to promote, protect and safeguard human rights; fostering relationships and creating integrated cooperation networks with all sectors; and boosting trust among investors and trading partners, thereby stimulating the economy.²⁶ Business enterprises are understood as specific entities that perform specialized functions, necessary to be in conformity with all applicable laws and to respect human rights. Lastly, when rights and obligations are breached, there must be access to appropriate and effective remedies through a variety of venues that can be State-based and non-State-based.

²² LOPEZ, Andres Felipe. Contemporary responses to businesses' negative human rights impacts. *Revista de Direito Internacional*, Brasília, v. 17, n. 1, p. 340-361, 2020. p. 349.

²³ LOPEZ, Andres Felipe. Contemporary responses to businesses' negative human rights impacts. *Revista de Direito Internacional*, Brasília, v. 17, n. 1, p. 340-361, 2020. p. 349.

²⁴ LOPEZ, Andres Felipe. Contemporary responses to businesses' negative human rights impacts. *Revista de Direito Internacional*, Brasília, v. 17, n. 1, p. 340-361, 2020. p. 349.

²⁵ BARNES, Mihaela Maria. The United Nations guiding principles on business and human rights, the State duty to protect human rights and the State-business nexus. *Revista de Direito Internacional*, v. 15, n. 2, p. 41-63, 2018. p. 55.

²⁶ UNITED NATIONS. *United Nations Guiding Principles on Business and Human Rights*. India: UNDP India. Available at: <https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf>. Access on: 14 Oct. 2024.

The second pillar of the UNGP includes the corporate responsibility to respect human rights and encompasses the principles that were analyzed by the Hague district court. It requires businesses to be duly diligent in becoming aware of, preventing and addressing their adverse human rights impacts and, as part of this due diligence process, businesses should adopt a human rights policy, conduct human rights impact assessments, integrate the human rights policy throughout the company, and track performance.²⁷ Other core elements of the second pillar are the concept of sphere of influence which can dictate the scope of a business' human rights due diligence and the requirement that businesses should ensure that they are not complicit in human rights abuses.²⁸

A key aspect of the implementation of the UNGP is that it is non-discriminatory. In this regard, special attention must fall on the rights and needs of individuals who integrate groups or populations that may face high risk of ending up in a situation of vulnerability or marginalization. In the same sense, due consideration of a variety of risks potentially faced by women and men is a practice inside the scope of the UNGP.

The emphasis of the analysis now turns to principles 11, 13 and 19, which were appreciated by the court in Milieudefensie case. According to principle 11, business enterprises should respect human rights. In other words, they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. To do so, business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.²⁹ Additionally, they may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights,

²⁷ CHOUDHURY, Barnali. The UN Guiding Principles on Business and Human Rights and Principles for Responsible Contracts: an introduction. In: CHOUDHURY, Barnali (ed.). *The UN Guiding Principles on Business and Human Rights: a commentary*. Cheltenham: Edward Elgar Publishing, 2023. p. 4.

²⁸ CHOUDHURY, Barnali. The UN Guiding Principles on Business and Human Rights and Principles for Responsible Contracts: an introduction. In: CHOUDHURY, Barnali (ed.). *The UN Guiding Principles on Business and Human Rights: a commentary*. Cheltenham: Edward Elgar Publishing, 2023. p. 4-5.

²⁹ UNITED NATIONS. *Guiding Principles on Business and Human Rights*. New York: United Nations, 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guiding-principlesbusinesshr_en.pdf. Access on: 26 Nov. 2023.

but this does not offset a failure to respect human rights throughout their operations.³⁰

Regarding principle 13, two actions that business enterprises must take within the responsibility to respect human rights are clarified. They are the following: avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. The commentary to the principle clarifies that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties.³¹ This is a statement that refers to a situation similar to the facts in *Milieudéfensie* case insofar as RDS recognizes that its greenhouse gas emissions comprise direct emissions from its sources, indirect emissions from third-party sources from which it purchased energy for its operations and other indirect emissions that are a consequence of the organization's activities, but taking place from greenhouse gas sources owned or controlled by third parties such as other organizations or consumers. Additional clarifications are provided as business enterprise's activities are understood to include both actions and omissions; and its business relationships are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.³²

Considering principle 19, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action. Effective integration comprises responsibility for addressing such impacts that is assigned to the appropriate level and function within the business enterprise; and internal decision-making,

³⁰ UNITED NATIONS. *Guiding Principles on Business and Human Rights*. New York: United Nations, 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guiding-principlesbusinesshr_en.pdf. Access on: 26 Nov. 2023.

³¹ UNITED NATIONS. *Guiding Principles on Business and Human Rights*. New York: United Nations, 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guiding-principlesbusinesshr_en.pdf. Access on: 26 Nov. 2023.

³² UNITED NATIONS. *Guiding Principles on Business and Human Rights*. New York: United Nations, 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guiding-principlesbusinesshr_en.pdf. Access on: 26 Nov. 2023.

budget allocations and oversight processes that enable effective responses to such impacts. Appropriate action varies according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; and to the extent of its leverage in addressing the adverse impact. The commentary explains that the horizontal integration across the business enterprise of specific finding from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions.³³

3 The application of the UNGP in *Milieudéfensie* case

After the understanding of the key features of the UNGP and of their respective principles that influenced the court's ruling, the paper turns now to the issues of *Milieudéfensie* case. The presentation of the facts is followed by an analysis of the applicable law and by a reflection on the construction of the punishment that fell on RDS.

3.1 Understanding the facts of the case

The key actors in the dispute are the association *Milieudéfensie* and the other parties (henceforth *Milieudéfensie et al.*) it represents on one side and Royal Dutch Shell (RDS) on the other side. *Milieudéfensie* constitutes the representative *ad litem* of 17379 individual claimants and six additional nongovernmental organizations. They argue that RDS must reduce its emission in conformity with the objective of the Paris Agreement, which is to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1,5°C above pre-industrial levels. The defendant, RDS, has particular characteristics that deserve to be explained. RDS is a public limited company, a legal person under private law, established under the laws of England and Wales.³⁴ Since

³³ UNITED NATIONS. *Guiding Principles on Business and Human Rights*. New York: United Nations, 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guiding-principlesbusinesshr_en.pdf. Access on: 26 Nov. 2023.

³⁴ NETHERLANDS. The Hague District Court. *Class action*

2005, RDS has been the top holding company of the Shell group and was in 2021 the direct or indirect shareholder of over 1100 separate companies established all over the world.³⁵ More clearly, RDS is the parent company of an international network of subsidiaries active in the production and sale of oil and gas.

In April 2018, Milieudefensie sent a letter in which it held RDS responsible for its current policy and claimed conformity with the climate objectives foreseen on the Paris Agreement. RDS replied in a letter written one month later, in which it stated that the allegations of Milieudefensie were unfounded, that the courts were not the adequate forum for issues about the energy transition, and that the perspective of Milieudefensie was not constructive. In February 2019, Milieudefensie *et al.* made available a second letter, through which it gave RDS another chance to comply with its previous claims, which RDS declined in a letter one month later.

In face of the inaction of RDS, Milieudefensie *et al.* then filed a class action against RDS before the Hague district court. Among the claims presented by them, emphasis will fall on the ones that are close to the punishment imposed on RDS by the referred court. The plaintiffs contended that RDS must fulfill an obligation founded on the unwritten standard of care to contribute to the prevention of hazardous climate change. They claimed for the court to decide that RDS adopted an unlawful conduct towards Milieudefensie *et al.* in the circumstance in which RDS, both directly and through the companies and legal entities inserted in its consolidated annual accounts and that integrate the Shell group, principally does not reduce or leads to the reduction by at minimum 45% or net 45% relative to 2019 levels, up to year-end 2030, the total annual volume of all CO2 emissions into the atmosphere derived from the business operations and traded energy products of the Shell group. Alternatively, Milieudefensie *et al.* claimed for the

court to decide that RDS acted unlawfully when practicing the aforementioned acts that do not reduce or lead to the reduction firstly by at minimum 35% or net 35% relative to 2019 levels, until the end of 2030 or further in the alternative by at minimum 25% or net 25% relative to 2019 levels, until the end of 2030. The aforementioned emissions encompass those based on RDS' own business activities and those derived from the sales of its energy products.

The Hague district court then assessed the claims brought by Milieudefensie *et al.* based on legal parameters. They are the following: the standard of care foreseen on Book 6, Section 162 of the Dutch Civil Code; ECHR article 2 and article 8; the UNGP; the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the OECD guidelines) and the SDGs. The application of the parameters to the decision of the dispute is further explained and analyzed in the following subchapters.

3.2 Applicable law in Milieudefensie case

On the applicable law issue, the district court provided its reasoning after taking cognizance of the parties' arguments. For the sake of clarity, the concepts of corporate responsibility, environmental damage and human rights are clarified in order to allow a clearer understanding of the analysis below. Corporate responsibility constitutes a business model whose core feature is a concerted effort by corporations to act towards improving society and the environment. In order to implement this business model, the literature suggests companies to create permanent discussion forums for a new green and politically correct consciousness; encourage partners, including commercial partners, to prioritize ecology in their agendas; and effectively integrate economy and environment in order to meet the basic needs of present and future generations.³⁶ The environmental damage constitutes a broad expression that encompasses harmful changes to the environment and the implications for people's health and interests. Human rights are rights prior to and superior to the State

C/09/571932 HA ZA 19-379. Claimants: Milieudefensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

³⁵ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

³⁶ MORAIS, Dulce Teresinha Barros Mendes de; OLIVEIRA, Maria Neuza da Silva; MATIAS-PEREIRA, José; BARBOSA, Washington Luís Batista. O papel do direito no contexto do desenvolvimento sustentável: uma avaliação qualitativa de programas corporativos de responsabilidade socioambiental. *Revista de Direito Internacional*, v. 9, n. 3, p. 141-158, 2012. p. 156.

and inherent to the human condition that are codified in binding international treaties.

The parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO₂ emissions constitutes environmental damage in the sense of Article 7 Rome II³⁷, but were divided on the question on what should be seen as an ‘event giving rise to the damage’ in the sense of this provision.³⁸ An event giving rise to the damage consists of the injury to a good that causes immediate damage. While *Milieudéfensie et al.* claim that this constitutes the corporate policy established for the Shell group by RDS in Holland, which leads to the applicability of Dutch law, RDS alleges that the event provoking the damage are the concrete CO₂ emissions, which turns the choice of law of *Milieudéfensie et al.* as encompassing a variety of legal systems.

On this second issue, the court examined the features of the environmental damage in the Netherlands and the Wadden region. It took the view that RDS’ CO₂ emissions only cause environmental damage and imminent environmental damage in conjunction with other emissions of CO₂ and other greenhouse gases for Dutch residents and the inhabitants of the Wadden region and that 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.³⁹ According to the

court, the underpinning consideration is that each contribution to the reduction of CO₂ emissions may be relevant. Therefore, the court is of the opinion that these distinctive aspects of responsibility for environmental damage and imminent environmental damage must be included in the answer to the question on what in this case should be understood as ‘event giving rise to the damage’ in the sense of Article 7 Rome II.⁴⁰

Although Article 7 Rome II refers to an ‘event giving rise to the damage’, i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage.⁴¹ When applying Article 7 Rome II, RDS’ adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region.⁴² The court, thus, considers that the conditional choice of law of *Milieudéfensie et al.* is in line with the concept of protection underlying Article 7 Rome II.⁴³

defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

³⁷ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: *Milieudéfensie et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

³⁸ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: *Milieudéfensie et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

³⁹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: *Milieudéfensie et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁴⁰ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: *Milieudéfensie et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁴¹ Rome II constitutes Regulation (EC) 864/2007 on the law applicable to non-contractual obligations. Its article 7 establishes that the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. In turn, article 4(1) of the same regulation provides that, unless otherwise provided for in this regulation, the law applicable to a non-contractual obligation arising out of a tort or a delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

⁴² NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: *Milieudéfensie et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁴³ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: *Milieudéfensie et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

Besides the clarification on the applicable hard law, the court expressed its own view of the UNGP applicability to the dispute through the delineation of their content and the clarification of their reach. According to the court, they constitute an authoritative and internationally endorsed soft law instrument, which sets out the responsibilities of States and businesses in relation to human rights and does not create any new right nor establish legally binding obligations.⁴⁴ Additionally, when appreciating the soft law instruments pertinent to this case, the court understood that the UNGP are in line with the content of other, widely accepted soft law instruments, such as the UN Global Compact (UNGC) principles⁴⁵ and the OECD guidelines.^{46,47} The court, therefore, rejected RDS opposite argument in its statement of defence. In its view, the UNGP are generally considered to be soft law and thus incapable of being invoked directly by third parties such as Milieudefensie, least of all in court proceedings.⁴⁸

The court then highlighted the corporate responsibility foreseen on the UNGP applicable to the case. In regards to its content, the court clarified that the duty to

respect human rights requires companies to avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁴⁹ This obligation to respect human rights must be fulfilled in the company's whole value chain. Moreover, it explained that the responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate that exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations and that exists over and above compliance with national laws and regulations protecting human rights.⁵⁰ The court concluded that it is not enough for companies to monitor developments and follow the measures that States take as they have an individual responsibility.⁵¹

In order to respect human rights, the court underscored two main actions of businesses. They should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved by means of measures that must be taken to prevent, limit and, where necessary, address these impacts.⁵² This responsibility applies everywhere,

documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁴⁴ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie et al. Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁴⁵ The UNGC is an initiative of the UN Secretary-General dedicated to sustainability that aims to accelerate and scale the global collective impact of business by upholding a group of principles and delivering the sustainable development goals (SDGs) by means of accountable corporations and ecosystems that allow change.

⁴⁶ Besides the reasoning of the court, John Ruggie, the leader of the creation of the UNGP, recognizes that the OECD guidelines contain a human rights chapter based on the UNGP.

⁴⁷ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie et al. Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁴⁸ NETHERLANDS. The Hague District Court. *C/09/571932 2019/379*. 1. Vereniging Milieudefensie And The Others It Represents, 2. Stichting Greenpeace Nederland, 3. Landelijke Vereniging Tot Behoud Van De Waddenzee, 4. Stichting Ter Bevordering Van De Fossielvrijbeweging, [...]. Attorneys: mr. J. de Bie Leuveling Tjeenk; N.H. van den Biggelaar; D. Horeman. Claimants: R.H.J. Cox; mr. D.M.J. Hague, 13 Nov. 2019. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20191113_8918_reply.pdf. Access on: 15 Oct. 2024.

⁴⁹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie et al. Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵⁰ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie et al. Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵¹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie et al. Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵² NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudefensie et al. Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at:

regardless of the local legal context, and is not passive as it requires action on the part of businesses.⁵³

The actions are conditioned, according to the court, to the means available. The scale and complexity of the means through which enterprises meet the responsibility to respect human rights may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.⁵⁴ The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size.⁵⁵ The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually.⁵⁶

The court then attributed concrete contours to the concepts explained above. RDS' value chain encompasses the closely affiliated companies of the Shell group, on which it has a policy-setting influence, which include the business relations from which the Shell group purchases raw materials, electricity and heat and, at the end of the value chain, the end-users of the products

produced and traded by the Shell group.⁵⁷ RDS' responsibility therefore also extends to the CO2 emissions of these end-users that are inserted on Scope 3⁵⁸ of the Greenhouse Gas Protocol (GHG Protocol).⁵⁹

The court understood the UNGP as a guideline to the interpretation of the unwritten standard of care, which underpins RDS' reduction obligation. Next to it, the court has also included the internationally propagated and endorsed need for companies to genuinely take responsibility for Scope 3 emissions.⁶⁰ This need is more pressing where these emissions constitute most of a corporation's CO2 emissions, which is the case of the Shell group, where around 85% of its emissions are classified as Scope 3. In a similar manner, a statute can also harden the UNGP, in which case a court would apply a soft law standard that made its way into domestic legislation. An example is the recently revoked Brazilian Decree 9571/2018, which expressly incorporated the UNGP and, significantly, has been invoked as

https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵³ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵⁴ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵⁵ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵⁶ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵⁷ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁵⁸ GHG Protocol consists on a group of governance bodies that creates detailed global standardized structures to measure and administer GHG emissions from private and public sector activities, value chains and mitigation practices. Scope 1 of the GHG Protocol gathers direct emissions from sources whose ownership or control belongs fully or partially to an organization. Scope 2 of the GHG Protocol comprises indirect emissions from third-party sources from which an organization has bought or acquired electricity, steam, or heating for its activities. Scope 3 of the GHG Protocol encompasses indirect emissions arising from activities of an entity, but taking place from GHG sources whose ownership or control belongs to third parties, such as other entities or consumers, comprising emissions from the use of third-party acquired crude oil and gas.

⁵⁹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁶⁰ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

a standalone argument in pending climate litigation case *Conectas versus BNDES and BNDESPar*.

The court interpreted RDS' actions to identify and evaluate the adverse effects of its emissions based on principles 11 and 13 of the UNGP that comprise respectively the responsibility to respect human rights and the acts to perform this responsibility. RDS knows that the exploration, production, refinery, marketing, and the purchase and sale of oil and gas by the Shell group as well as the use of products of the Shell group generate significant CO₂ emissions worldwide, which undoubtedly contributes to climate change in the Netherlands and the Wadden region.⁶¹ RDS has for a long time known of the dangerous consequences of CO₂ emissions and the risks of climate change to Dutch residents and the inhabitants of the Wadden region and knows the amount of CO₂ emissions of the Shell group, which was reported on the volume of CO₂ emissions.⁶² Finally, based on RDS submission to Carbon Disclosure Project (CDP)⁶³ in 2019, the court understands that RDS regularly monitors and assesses the climate-related risks of its business activities and those of its business relations, namely for the short term – a period of up to three years –, the mid-term – a period of between three to ten years – and the long term – a period of more than ten years ahead.⁶⁴

Lastly, in its reasoning based on the UNGP, the court recommended companies to take appropriate ac-

tion based on principle 19 of the UNGP. The court recalled that appropriate action will vary according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; and the extent of its leverage in addressing the adverse impact.⁶⁵

3.3 Elements of the punishment imposed on RDS

Before entering on the reasons for RDS' condemnation, theoretical considerations are provided on the institute of punishment to better understand its effects on RDS' activities and its limits. The considerations are based on the writings of Emilie Hafner-Burton in her book *Making human rights a reality*, where she analyzes situations in which States meddle in the behavior of other States to promote human rights in the foreign level. The considerations presented are also applicable to corporations. Punishments contribute to change human rights abuses in places where they take place. Punishment, like other forms of coercion, works by changing how abusers calculate costs and benefits and therefore tends to encourage tactical changes in policy – such as reforms that placate human rights advocates, trade partners, aid givers, or investors – rather than persuading governments to adopt fundamentally new perspectives on the kinds of behavior that are appropriate.⁶⁶ Punishments, once threatened or implemented, must frequently remain in force so that the convicted defendant does not return to practice abuses when he recalculates costs and benefits. Delivering punishments that are painful enough to make perpetrators change their behavior can be costly even for the richest stewards of human rights, and not all stewards are rich, a factor that helps explain why punishment strategies are particularly difficult to organize when the target is large or strategically important.⁶⁷

⁶¹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁶² NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁶³ CDP constitutes an international non-profit charity that manages the global disclosure system for investors, companies, cities, States and regions.

⁶⁴ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁶⁵ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁶⁶ HAFNER-BURTON, Emilie. *Making human rights a reality*. New Jersey: Princeton University Press, 2013. p. 144.

⁶⁷ HAFNER-BURTON, Emilie. *Making human rights a reality*. New Jersey: Princeton University Press, 2013. p. 144.

A punishment strategy is not also fully effective when targets are able to act in a way to attenuate the sanctions. For instance, a recurring problem with economic sanctions is that sanctioners must coordinate and put forward a unified front in order to prevent the targets from searching for new partners who are less demanding on human rights issues. On the climate issue, highly polluting industries from developed countries move their facilities to countries with weak environmental regulations, where they will hardly be targeted by sanctions, an industrial practice known as carbon leakage.

Punishments do not necessarily need to be severe to work, but research on crime and punishment suggests they do need to be swift, credible, and sustainable so that criminals can see a clear link between their behavior and the consequences.⁶⁸ Moreover, when criminals make strategic concessions such as the implementation of new policies to avert retribution, stewards may mitigate the punishment, an action that raises doubts on how credible future punishments will be. When perpetrators integrate deep networks, the adoption of effective punishments can put a heavy burden on stewards who must not only be fast in their punishment but also sustained, coherent and systemic when imposing a sanction on the whole network. This consideration comes close to Shell group structure, in which RDS is the top holding company above intermediate parents, operating companies and service companies. RDS also occupies the position of direct or indirect shareholder of more than 1000 companies established worldwide.

Moving to Milieudéfensie case, the court provided the reasons to condemn RDS. The court understands that the Shell group is a major player on the worldwide market of fossil fuels as, if all scopes (1 through to 3) are included, the Shell group is responsible for significant CO₂ emissions all over the world.⁶⁹ Moreover, according to the court, the total CO₂ emissions of the Shell group (scope 1 through to 3) exceed the CO₂ emissions of many States.⁷⁰ The court recognizes

that the adaptation strategies alleged by RDS comprise measures that can address the effects of climate change. However, these strategies do not alter the fact that climate change due to CO₂ emissions has serious and irreversible consequences, with potentially very serious and irreversible risks for Dutch residents and the inhabitants of the Wadden region.⁷¹ Additionally, the court implicitly does not understand as sufficient scope 1 and scope 2 emissions reduction in 2018 in comparison with 2017 claimed by RDS.

RDS condemnation was also based on the valuation by the court of the human right to life and of the right to respect for private and family life foreseen respectively on ECHR article 2 and article 8. In the context of litigation against corporations, which are not directly bound by international treaties, the use of international human rights treaties to interpret a domestic standard of care can be key to establishing liability for what is essentially a human rights violation.⁷² The court underscores that these rights are also provided for in the International Covenant on Civil and Political Rights. It is the court understanding that RDS' argument that the human rights invoked by Milieudéfensie *et al.* offer no protection against dangerous climate change therefore does not hold.⁷³ The serious and irreversible consequences of dangerous climate change in the Netherlands and the Wadden region pose a threat to the human rights of Dutch residents and the inhabitants of the referred region.⁷⁴ At this point, Milieudéfensie case takes Urgenda

fendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷¹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷² MACCHI, Chiara; VAN ZEBEN, Josephine. Business and human rights implications of climate change litigation: Milieudéfensie *et al.* v Royal Dutch Shell. *Review of European, Comparative and International Environmental Law*, v. 30, p. 409-415, 2021. p. 412.

⁷³ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁴ NETHERLANDS. The Hague District Court. *Class action*

⁶⁸ HAFNER-BURTON, Emilie. *Making human rights a reality*. New Jersey: Princeton University Press, 2013. p. 145.

⁶⁹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁰ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfensie *et al.* De-

up a notch in the application of the ECHR insofar as the court decided that an individual responsibility to protect human rights falls on all companies. The Urgenda case was circumscribed to the recognition that the respective rights provide protection from hazardous climate change and thereafter entail a duty to act to face this threat.

The SDGs were another parameter considered to the condemnation of RDS. Companies' obligations and responsibilities are not recognized in the SDGs as happens in the UNGP. Despite that, the court reasons that SDGs encompass the twin challenge of curbing dangerous climate change concomitantly to meeting the global energy demand of the rapidly growing population.⁷⁵ The court included the SDGs in its interpretation of the unwritten standard of care, as UN Resolution A/RES/70/1 represents a widely endorsed international consensus.⁷⁶ The court took the view that there is a connection between the SDGs and the climate goals of the Paris Agreement and other agreements made for the implementation of the United Nations Framework Convention on Climate Change as the global nature of climate change calls for the widest possible international cooperation aimed at accelerating the reduction of global greenhouse gas emissions and addressing adaptation to the adverse impacts of climate change.⁷⁷ Therefore, the SDGs cannot be a motive for the noncompliance by RDS of its reduction obligation. In its reasoning, the court also extended the obligations of the Paris

Agreement, a treaty among States, to a private entity. The court's interpretation of the SDGs is thus different from the one provided by RDS in its statement of defence, which shows that, in a scenario guided by the desired outcomes foreseen in SDG 7 on energy access, fossil fuel demand would still correspond to 60% of the whole energy demand by 2040 and that there can be trade-offs among the SDGs in the sense that climate change mitigation, a measure aligned with SDG 13 on climate action, could hinder the achievement of SDG 1 on poverty eradication, SDG 2 on zero hunger, SDG 6 on clean water and SDG 7.

The refusal of RDS' arguments by the court also led to the company's condemnation. RDS presented the argument of perfect substitution, whereby the place of the Shell group will be taken over one-on-one by other parties.⁷⁸ The argument formulated by RDS reflects a business as usual scenario in which the world economy continues to operate mostly on fossil fuels, so that the CO₂ accumulation in the atmosphere keeps increasing fastly. However, it was uncertain whether this circumstance would transpire as other companies also have to respect human rights and the proof provided by RDS, the Mulder Report⁷⁹, seems to be a snapshot.⁸⁰ This is so, because it starts from a 'business as usual' scenario and not from other scenarios, in which other oil and gas companies also limit their investments in oil and gas, voluntarily, under pressure, or due to retreating investors, or as sustainable methods of energy generation become available worldwide.⁸¹

C/09/571932 HA ZA 19-379. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁵ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁶ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁷ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁸ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁷⁹ According to this report, the claimed emissions reduction will lead to a production reduction within the Shell group. That said relevant production reduction will be, however, negated as a result of the historical characteristics of the oil and gas market and the increasing production of other oil and gas companies.

⁸⁰ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸¹ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M.

Lastly, the court imposed the CO2 reduction obligation on RDS based on a comparison between RDS' interests and society's interests in preserving a healthy climate. The interest served with the reduction obligation outweighs the Shell group's commercial interests, which for their part are served with an uncurtailed preservation or even growth of these activities.⁸² The court qualified the first interest as compelling, while RDS might face negative consequences arising from the reduction obligation.

Taking these considerations into account, the court assessed the proportionality of the reduction obligation. In the court's understanding, the CO2 emissions for which RDS can be held responsible by their nature pose a very serious threat, with a high risk of damage to Dutch residents and the inhabitants of the Wadden region and with serious human rights impacts, which applies to current and future generations.⁸³ A characteristic element of dangerous climate change is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this development, which turns each reduction of greenhouse gas emissions a positive contribution to countering dangerous climate change.⁸⁴ Furthermore, RDS is able to effectuate a reduction by changing its energy package.⁸⁵ This all justified a reduction obligation

concerning the policy formation by RDS for the entire, globally operating Shell group.⁸⁶ The court, thereby, disregarded information brought by RDS on the proportionality issue such as the supposed fact that approximately 85% of CO2 emissions related to fossil fuels derive from their combustion by final consumers and that a minimal proportion derives from the previous business processes. In a lucid manner, Macchi and Van Zeven clarify that the Court found the obligation proportionate to the importance of the values to be protected – namely, the human rights of the plaintiffs – especially as RDS has complete discretion as to how to discharge its duty.⁸⁷

In the condemnation of RDS, the court applied the standard of care towards current and future Dutch citizens to Shell. It ordered the company to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels. The court granted flexibility to Shell in the allocation of emissions cuts between Scope 1, 2, and 3 emissions, insofar as in aggregate, the total emissions were reduced by 45%. On this issue, the court noted that a global reduction obligation, which affects the policy of the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units.⁸⁸ Additionally, companies must take responsibility

Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸² NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸³ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸⁴ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸⁵ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M.

Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸⁶ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

⁸⁷ MACCHI, Chiara; VAN ZEBEN, Josephine. Business and human rights implications of climate change litigation: Milieudéfense *et al.* v Royal Dutch Shell. *Review of European, Comparative and International Environmental Law*, v. 30, p. 409-415, 2021. p. 412.

⁸⁸ NETHERLANDS. The Hague District Court. *Class action C/09/571932 HA ZA 19-379*. Claimants: Milieudéfense *et al.* Defendant: Royal Dutch Shell. Rapporteurs: mr. L. Alwin, mr. I.A.M. Kroft and mr. M.L. Harmsen. Nederland, 26 May 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf. Access on: 20 May 2024.

for Scope 3 emissions, mainly in circumstances in which these emissions constitute the majority of a company's CO₂ emissions, as happens for companies that make and sell fossil fuels.

After the issuance of the sentence, several criticisms arose in the literature. The explanation of the criticisms aims to shed light on vulnerable parts of the sentence that may be reversed on appeal and on innovative aspects found on it that may be present on future cases of climate litigation against corporations. The judgement marks the first time a court imposes a specific mitigation obligation on a private company over and above reduction targets set by existing "cap-and-trade regulations" and or other governmental mitigation policies.⁸⁹

The sentence, however, lacks the court's motivations for several essential choices. The court selects an IPCC mitigation pathway that assumes 45% reduction in global CO₂ emissions by 2030, compared with 2010, noting that 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".⁹⁰ Yet, the Court does not justify why it selected this, rather any other pathway consistent with some plausible interpretations of the temperature targets.⁹¹ For instance, another IPCC pathway, associated with a 66% chance of achieving the 2°C target, assumes only 25% reduction in global CO₂ emissions by 2030.⁹² 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.⁹³ The

most recent IPCC assessment report published in 2023, on its turn, provides further conflicting data. It presents 2019 as the base year and estimates a 21% reduction in greenhouse gas emissions by 2030 to limit global warming to 2°C with a probability higher than 67%. In order to contextualize the numbers, the last IPCC assessment report clarifies that limiting global temperature increase to a specific level requires limiting cumulative net CO₂ emissions to within a finite carbon budget along with strong reductions in other greenhouse gases and that, when CO₂ emissions raise, carbon sinks are projected to be less effective at slowing the CO₂ accumulation in the atmosphere.⁹⁴

The recourse to human rights treaties to interpret Shell's duty of care was also criticized. The treaties mentioned by the court do not contain any specific standards that can help to determine the requisite level of mitigation action of any particular actor, an aspect that falls on States, and even more so on corporations.⁹⁵ Thus, the reference to human rights treaties is purely ornamental; it cannot help the Court to determine the content of Shell's mitigation duty.⁹⁶ Nor is the reference to human rights helpful in determining the existence of a duty of care; the fact that CO₂ emissions cause illicit harm can be justified without reference to human rights law.⁹⁷ The court could have avoided this pitfall through the connection of the right to life and of the right to respect for private and family life with RDS routine economic activities through a language similar to the one found on the commentaries to each principle foreseen on the UNGP.

On the other hand, the sentence is praised due to the insertion of future generations in climate litigation, an issue that deserves to be analyzed in another paper. This insertion arises from the recognition that RDS' CO₂ emissions pose a grave threat, with grave human

⁸⁹ MACCHI, Chiara; VAN ZEBEN, Josephine. Business and human rights implications of climate change litigation: *Milieudefensie et al. v Royal Dutch Shell*. *Review of European, Comparative and International Environmental Law*, v. 30, p. 409-415, 2021. p. 409.

⁹⁰ MAYER, Benoit. *Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?* *EJIL: Talk!*, 3 June 2021. Available at: <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>. Access on: 25 Nov. 2023.

⁹¹ MAYER, Benoit. *Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?* *EJIL: Talk!*, 3 June 2021. Available at: <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>. Access on: 25 Nov. 2023.

⁹² MAYER, Benoit. *Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?* *EJIL: Talk!*, 3 June 2021. Available at: <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>. Access on: 25 Nov. 2023.

⁹³ MAYER, Benoit. *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation*. *Transnational Environmental Law*, v. 11, n.

2, p. 407-418, Jul. 2022. p. 414.

⁹⁴ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. Sections. In: LEE, H.; ROMERO, J. *Climate Change 2023: Synthesis Report: contribution of working groups I, II and III to the sixth assessment report of the Intergovernmental Panel on Climate Change*. Geneva: [s.n.], 2023. p. 82.

⁹⁵ MAYER, Benoit. *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation*. *Transnational Environmental Law*, v. 11, n. 2, p. 407-418, Jul. 2022. p. 413.

⁹⁶ MAYER, Benoit. *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation*. *Transnational Environmental Law*, v. 11, n. 2, p. 407-418, Jul. 2022. p. 413.

⁹⁷ MAYER, Benoit. *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation*. *Transnational Environmental Law*, v. 11, n. 2, p. 407-418, Jul. 2022. p. 413.

rights impacts, which applies to current and future generations. The court, thus, recognized that human rights guarantee an absolute minimum, and this minimum guarantee is what Milieudefensie could successfully enforce on behalf of present and future generations.⁹⁸ The argument on the need to attain intergenerational equity is not particular to Milieudefensie case and is one of the most widely used arguments in climate litigation. The intergenerational equity issue has been examined in other cases by means of the attribution of the mitigation burden among different generations and of the effects that future reduction measures will generate on future generations' essential freedoms. Additionally, in the active pole of a legal dispute, young people fight in the courts to preserve their future, raising the profile of climate cases and increasing public awareness of future generations' rights, a conduct that reveals that intergenerational equity in climate litigation is in itself a source of hope.⁹⁹

A factual development of the Milieudefensie case ruling was also verified. Shell moved its headquarters to London after the dispute, a fact that must be acknowledged when discussing punishment. The subsequent case against Shell board of directors took place in London, where the sentence admits provisional enforcement. The environmental charity ClientEarth filed a lawsuit against Shell's Board of Directors due to the failure to distance itself from fossil fuels at a rapid pace. In May 2023, the UK High Court declined the case and later, in January 2024, the appeal filed was rejected. This dispute was a world-first, aiming to turn corporate directors personally liable, and an innovative attempt to ensure necessary clarification on the legal obligations of directors in a moment of climate crisis.

4 Conclusion

The UNGP influence the conduct of business enterprises. Their effect is perceptible, for instance, on the stimulus for businesses to act diligently in taking cog-

nizance of, preventing and facing their adverse human rights impacts; implement a human rights policy and perform human rights impact assessments. They are implemented in a non-discriminatory manner and aim to protect groups or populations that can face high risk of living in a condition of vulnerability or marginalization. Groups living near the frontline of climate change effects will continuously suffer the consequences of human rights violations perpetrated by companies and of corporate climate inaction stimulated in executive boardrooms. The UNGP represent, moreover, an achievement in public international law as it was the first body of authoritative guidelines that the Human Rights Council had ever produced on how to deal with the complex international challenges of business and human rights; and it also was the first moment when the referred Council had ever endorsed a prescriptive text on any theme in which governments were not the sole negotiators.

The previous analysis reveals that the decision in Milieudefensie case thickens RDS' responsibilities foreseen in the UNGP, which are not formally legally binding. This characteristic of the UNGP turns the implementation of environmental and social policies by private actors voluntary and makes it difficult to reach an alternative path that seeks to achieve jointly economic prosperity, social inclusion and environmental sustainability. The development in Milieudefensie case is of crucial importance for two main reasons: first, effective climate change policy is only possible with substantial private action, mainly by actors such as RDS which can reduce the CO2 emissions; and second, the slow and considerable ineffective nature of international state action on tackling climate change.

The UNGP contribution to the resolution of the case resides on its character as a global standard of expected conduct for all business enterprises and on its function as a guideline to the identification of corporate responsibility. RDS' measures to identify and assess the adverse effects of its emissions were interpreted in light of principles 11 and 13 of the UNGP that encompass respectively the responsibility to respect human rights and the acts to perform this responsibility. The interpretation reveals a clear synergy between climate change and human rights. Additionally, the court recommended companies to take adequate measures based on principle 19 of the UNGP that disciplines enterprises' effective integration of findings from their impact as-

⁹⁸ MENSINK, Eline. Intergenerational Justice: From Courtroom to Politics? *Völkerrechtsblog*, 29 Aug. 2022. Available at: <https://voelkerrechtsblog.org/intergenerational-justice-from-courtroom-to-politics/>. Access on: 4 December 2023.

⁹⁹ KOTZÉ, Louis; KNAPPE, Henrike. Youth movements, intergenerational justice, and climate litigation in the deep time context of the Anthropocene. *Environmental Research Communications*, v. 5, p. 1-11, 2023. p. 9.

assessments and the need to take appropriate action. Next to the UNGP are hard law instruments such as international human rights treaties and soft law instruments such as the SDGs, which constituted parameters to the condemnation of RDS. The part of the sentence in Milieudefensie case that addresses the UNGP confirms the previous recognition in the literature that the combination of international climate law rules and international human rights law rules is increasingly – and successfully – invoked¹⁰⁰.

Besides the perspective of punishment that was analyzed in this paper, rewards also integrate the agenda on business, human rights and climate change. Rewarding consists on improvements in a target's value position relative to a baseline of expectations and is indispensably linked to compliance theory, but is undertheorized.¹⁰¹ In order to fill this gap, the introduction of rewards in soft law agreements that contain compliance mechanisms similar to treaty law has been suggested.¹⁰² Moreover, in theoretical terms, there has been the recognition that rewards can generate a reputation of goodwill that can increase cooperation.¹⁰³ Some excerpts of the sentence reveal limitations in the paths that RDS can take in the future to be rewarded. As RDS may renounce new investments in fossil fuel prospecting and/or may limit its production of fossil resources, the company could seek investments with characteristics opposite to traditional investments, namely the green investments. However, in face of many resolutions submitted since 2016 by the Dutch NGO Follow This, a shareholder in RDS, that contained the request to alter the Shell group investments in oil and gas in favor of sustainable energy, the RDS Board has continuously advised its shareholders to avoid approving these resolutions as they were contrary to the corporation's interest. The activities within RDS revealed that the majority of shareholders has not approved them.

¹⁰⁰ MALJEAN-DUBOIS, Sandrine. The recognition is found on, for example, MALJEAN-DUBOIS, Sandrine. International law as fuel for climate change litigation. *Revista de Direito Internacional*, v. 19, n. 1, p. 43-45, 2022. p. 45.

¹⁰¹ VAN AAKEN, Anne; SIMSEK, Betül. Rewarding in International Law. *American Journal of International Law*, v. 115, n. 2, p. 195-241, Apr. 2021. p. 196.

¹⁰² VAN AAKEN, Anne; SIMSEK, Betül. Rewarding in International Law. *American Journal of International Law*, v. 115, n. 2, p. 195-241, Apr. 2021. p. 203.

¹⁰³ VAN AAKEN, Anne; SIMSEK, Betül. Rewarding in International Law. *American Journal of International Law*, v. 115, n. 2, p. 195-241, Apr. 2021. p. 241.

Moreover, the court recognized that RDS has a high margin of discretion to perform its reduction obligation as it deems fit, which leaves room for continued investments in fossil fuels. Besides, RDS can manipulate information about its environmental and social performance in order to distort its corporate accountability and mislead stakeholders who act through the naming and shaming that is the activity of saying publicly that a company has behaved in a bad or illegal way. The practice of greenwashing would also be configured to the extent that there would be a fake disclosure of advertisements and campaigns with ecologically or environmentally responsible features such as the reduction in CO2 emissions higher than the one established by the Hague district court when deciding the Milieudefensie case.

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