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Response Commentary

An Apology Leading to Dystopia: Or, Why Fuelling Climate Change Is Tortious

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Abstract

This invited response commentary engages with Benoit Mayer's case comment, published in this issue of *Transnational Environmental Law*, on the recent landmark decision by the District Court of The Hague (The Netherlands) of May 2021 in *Milieudefensie* v. *Royal Dutch Shell*. The Court ordered the oil giant Royal Dutch Shell to reduce at least 45% of its greenhouse gas emissions by 2030 compared with 2019 levels. In this response commentary I build on and contrast Mayer's examination of how the Court arrived at this target. In doing so, I discuss the normativity of tort law compared with international law against the background of the ideas of Martti Koskenniemi. I conclude that the District Court legitimately qualified Shell's business plans as tortious. The specific reduction target is the result of civil procedural rules on evidence and the debate between the parties. In the light of this analysis, I respectfully reject Benoit Mayer's suggestion that sectoral practices should play a more significant role in determining corporate climate mitigation obligations. In my view, such an approach would be dangerously apologetic and lead to dystopian outcomes.

Keywords: Climate change litigation, Tort law, Corporations, Business and human rights, Normativity, Democratic legitimacy

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> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure … Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.
> Judge Learned Hand in *The Tj Hooper*, 60 F.2d 737 (2d Cir. 1932)

1. INTRODUCTION

This invited response commentary considers Benoit Mayer's analysis of the decision of the District Court of The Hague (The Netherlands) of 26 May 2021 in *Milieudefensie* v. *Royal Dutch Shell*, published in this issue of *Transnational Environmental Law*.[1] The Dutch environmental non-governmental organization (NGO) Milieudefensie,[2] six other NGOs, and 17,379 individual claimants[3] brought this climate case against the oil giant Royal Dutch Shell (Shell). The Hague District Court was the first court worldwide to order a private company to realize a specific greenhouse gas (GHG) emissions reduction target: at least 45% by 2030, compared with the year 2019.[4] This is a landmark ruling in many respects. Responding to Mayer's case comment allows me to discuss – albeit in a short and thus necessarily limited manner – fundamental questions regarding the normativity of tort law and the legitimacy of qualifying corporate plans to increase GHG emissions as tortious in the 21st century.[5]

While Mayer welcomes the establishment of a corporate duty to mitigate climate change, he criticizes the content of this duty as established by the District Court, and suggests an alternative approach for courts tasked with deciding comparable cases. In his reading, the Court interprets a political and global GHG reduction goal as 'a matter of scientific necessity', after which it relies 'exclusively' on 'descending' reasoning, ordering Shell to align with this goal as well.[6] Mayer suggests that the Court instead should have engaged in a mix of descending and ascending reasoning, as this combination would have forced the Court to take into account sectoral practices. Though '[a]dmittedly, ascending reasoning would not define a … very ambitious [standard]',[7] Mayer concludes that this alternative approach would lead to a 'more consistent' and 'more convincing' legal analysis.[8]

I respectfully disagree with this evaluation on two levels. On a general level, I would like to challenge its take on the normativity of tort law (Section 2). Mayer borrows the terminology of ascending versus descending reasoning from Martti Koskenniemi's

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1 B. Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: *Milieudefensie* v. *Royal Dutch Shell*' (2022) 11(2) *Transnational Environmental Law*, pp. 407–18.

2 'Milieudefensie', which translates as 'defence of the environment', forms the Dutch branch of the international NGO Friends of the Earth.

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

4 Ibid.

5 Shell plans to reduce GHG emissions *relative* to greener energy sources, but to continue to grow, thus to increase emissions, absolutely speaking: *Milieudefensie* v. *Shell*, para. 2.5.11.

6 Mayer, n. 1 above, pp. 413, 416.

7 Ibid., p. 417.

8 Ibid., p. 418.

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1989 classic *From Apology to Utopia*.[9] Accordingly, I explore key ideas from this book in relation to national tort law, in particular the standard of care that was used by the District Court to formulate the injunction against Shell. I suggest that problems identified with legal reasoning in *international law* are less relevant in the context of *national tort law*, but that Koskenniemi's book nevertheless provides useful guidelines for legal reasoning in this context too. Legitimacy of legal reasoning lies less in substantive outcomes than in an open and legitimate procedure, which is actualizing in rules of civil procedure in the context of tort law cases.

On a more specific level, regarding the case against Shell, I would like to offer an alternative reading of the Hague District Court's considerations (Section 3). I examine the judgment in the light of Koskenniemi's work on international legal reasoning. I submit that defining corporate climate obligations by referring to sectoral practices is dangerously apologetic and risks hollowing out the duty of care required under tort law, which, in the case of climate litigation, potentially leads to the dystopia that climate scientists have been warning the world about for decades.

2. NORMATIVITY AND CONCRETENESS IN NATIONAL TORT LAW

Koskenniemi's *From Apology to Utopia* provides a critical assessment of the supposedly objective character of international law. It argues convincingly that the 'objectivity' of international law relies on two mutually contradicting concepts: on the one hand, the idea of 'concreteness', based on actual state practice, will or interest; on the other, the idea of 'normativity', based on certain abstract ideas or rules. Both are visible in, for example, Article 38 of the Statute of the International Court of Justice (ICJ), which defines international customary law as 'evidence of a general practice accepted as law'.[10] The idea of concreteness is matched by the inductive argumentative style that Koskenniemi calls 'ascending', while the idea of normativity is matched with a 'descending' argumentative style.[11] From the perspective of each of these styles, the other is subjective:

> From the ascending perspective, the descending model falls into subjectivism as it cannot demonstrate the content of its aprioristic norms in a reliable manner (i.e. it is vulnerable to the objection of utopianism). From the descending perspective, the ascending model seems subjective as it privileges state will or interest over objectively binding norms (i.e. it is vulnerable to the charge of apologism).[12]

Moreover, in international (customary) law, the problems attached to the utopianism of normativity cannot be fixed by saying that a state has bound itself to international law in general, because that would violate the principle of sovereign equality.[13] This

[9] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

[10] New York, NY (US), 26 June 1945, in force 24 Oct. 1945, available at: http://www.icj-cij.org/en/statute.

[11] Koskenniemi follows Ullmann in this regard: Koskenniemi, n. 9 above, pp. 59–60 (citing W. Ullmann, *Law and Politics in Middle Ages* (Cambridge University Press, 1976), pp. 30–1).

[12] Koskenniemi, n. 9 above, p. 60.

[13] Ibid., p. 63.

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is essential in the context of international law: the relevant actors – states – are formally equals, which makes it impossible to determine the 'ought' independently from their actual practice. At the same time, if the norms of international law are only another way of expressing what states are doing, the law merely functions as an apology for the status quo and loses its regulatory potential.[14]

A similar mechanism seems to be in play with regard to the norm that forms the legal basis of Shell's GHG emissions reduction duty, namely Article 6:162(2) of the Burgerlijk Wetboek (BW) (Dutch Civil Code).[15] This provision defines what constitutes tortious behaviour, which includes (negligent) behaviour that violates unwritten law regarding what is *betamelijk* – that is, seemly/becoming/desirable in societal interrelationships.[16] The central concept in this provision – *betamelijk* – is laden with normativity. However, what counts as *betamelijk* should be inferred from 'unwritten law in societal interrelationships', suggesting a more 'concrete' approach.

Mayer's recommendation to take into account sectoral practices therefore may seem to present a doctrinal question about the interpretation of Article 6:162(2) BW: should what is deemed *betamelijk* (seemly/becoming/desirable) in the sense of this provision be interpreted by reference to how we think we *should* behave, or should this standard also be interpreted by reference to how people in society *actually* behave? This is not an easy question, because the two can overlap: if the majority of people refuse to wear face masks in public transport, this might point to the fact that there is little normative support for wearing masks. That said, they need not necessarily overlap: dog owners might actively look the other way when their furry friend does its business on a sidewalk, even if they believe that, in general, it behoves dog owners to do their part to keep the street clean.

Reading the provision more closely, however, the question of Article 6:162(2) BW is ultimately of a normative, not a sociological, nature.[17] Nevertheless, this normativity should be inferred from *concrete* normative views on unwritten laws in society (not

[14] E.g., interfering in a state's national politics because it does not respect women's rights can be seen as a violation of that country's sovereign equality – the imposition of respect for women's rights might seem detached from this country's perspective of what should be law (this detachment being 'utopianism'). Yet, if we never accept the authority of international law to confront states on their behaviour, we end up with no law at all ('apologism').

[15] Note that the legal basis of the order against Shell is composed of two BW provisions: firstly, Art. 3:296(1) BW, which I freely translate as: 'Unless the law, the nature of the obligation, or a legal act dictates otherwise, he who is legally obliged towards another to give something, to act, or to refrain from acting will be ordered thereto by the judge at the request of the entitled'; secondly, Art. 6:162(2) BW, the provision forming the basis for the existence of this legal obligation, which defines what constitutes tortious behaviour from which one should refrain.

[16] Art. 6:162(2) BW: 'Als onrechtmatige daad worden aangemerkt … een doen of nalaten in strijd … met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond'; freely translated: 'As tortious acts are seen: … an act or negligence violating … that which, according to unwritten law in societal interrelationships, is befitting, save for the existence of a ground for justification'.

[17] As Shell says in its summons to the Court of Appeal: '[T]here has to be a *moral* norm that has reached the status of a legally binding norm and can be enforced in court': Appeal by Royal Dutch Shell, Mar. 2022, para. 3.2.2; available at: https://www.shell.nl/media/nieuwsberichten/2022/waarom-shell-in-hoger-beroep-gaat.html (translation by the author, emphasis added). Afterwards, of course, Shell argues that such a norm does not exist, but the point here is that Shell acknowledges the normativity of *betamelijk*.

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concrete behaviour in society). It is not even necessary that the whole of society supports a certain norm – normative acceptance in relevant specialized circles of society can be sufficient.[18] Hence, in principle, Mayer is right in suggesting that courts in interpreting this provision should engage in some mix of ascending and descending reasoning: in determining what is the norm, they ascend from *concrete* ideas, which are *normative* indeed. Thus, judges do not infer the norm from their personal opinion.

The key question then becomes: *whose* views should be taken into account when interpreting Article 6:162(2) BW? It is here that Mayer's 'apologetic' suggestion to take into account sectoral practices falls prey to utopianism itself, because there is an implicit 'utopian' procedural norm behind this claim: namely, that sectoral practices are normatively relevant. In other words, whereas Mayer alleges that the District Court's reasoning is too utopian, a reader of his case comment might reproach him for supporting a different utopia in which the sectoral practices of big oil should be the ones to (co-)determine what is *betamelijk* in societal interrelationships.[19]

Can we ever escape these mind-bending circles of apologism and utopianism? Well, yes. The answer, however, cannot be found in substantive norms or in a static concept of law, but in an ongoing and open procedure through which subjects can exchange views as equals on how to act.[20] In Koskenniemi's words (referring to Habermas's *Legitimation Crisis*[21]):

> The legitimacy of critical solutions does not lie in the intrinsic character of the solution but in the openness of the process of conversation and evaluation through which it has been chosen and the way it accepts the possibility of revision—in the authenticity of the participants' will to agree.[22]

Now, in the context of national tort law this compromise is much easier to reach than in the context of international law, thanks to the procedural guarantees to facilitate legitimate collective decision making at the level of a national constitutional democracy. In international law, states are the lawmakers, subjects of the law and its enforcers, and the jurisdiction of the ICJ is relatively limited.[23] By contrast, parties in national tort proceedings are subject to the democratically legitimized laws enacted by the legislature, applied by the judiciary, and enforced by the executive.[24] These parties might have

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[18] As set out by T. Bleeker, 'Shell-vonnis is Geen Brug te Ver, Goed Dat Rechter Uitspraak Doet', 25 June 2021, *Het Financieele Dagblad*, available at: https://fd.nl/opinie/1389216/shell-vonnis-is-geen-brug-te-ver-goed-dat-rechter-uitspraak-doet.

[19] On this kind of circularity, see also Koskenniemi, n. 9 above, p. 532.

[20] See also J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1996), p. 107. Similarly, the hard sciences can never determine 'the truth', but the closest they get to it is an ever ongoing exchange of provisional hypotheses and rounds of Popperian falsification, i.e., the scientific method.

[21] Koskenniemi refers to J. Habermas, *Legitimation Crisis* (Beacon Press, 1975), p. 110.

[22] Koskenniemi, n. 9 above, p. 545.

[23] Only 73 of 193 United Nations (UN) Member States have accepted the ICJ's compulsory jurisdiction, according to the list available at: https://www.icj-cij.org/en/declarations.

[24] For the mirror argument – i.e., that it is *hard* to realize legitimacy at the international/transnational level in a way comparable with the national level – see N. Fraser & K. Nash, *Transnationalizing the Public Sphere* (Polity, 2014).

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played a role in the legislative process by voting or influencing democratic decision making from their position in the public sphere,[25] but otherwise this role is not comparable with that of states in the realm of international law. Indeed, applying national law against a party in tort law proceedings cannot be seen as a violation of its sovereign equality, unless one rejects the rule of law.[26]

Contract law – especially when a conflict arises in the interpretation of a contract – is closer to international law in this respect; that is, it focuses more on 'concreteness' in the sense that it leans on the parties' intentions. Contractual relations come into existence at the behest of the parties. By contrast, tort law relations can arise regardless of the intention of the parties. The emphasis in tort law is on normativity – its primary goal is to correct relational injustices that were not prevented by other areas of law,[27] such as criminal and administrative law, or even contract law.[28] Notwithstanding the academic debate on which notion of justice underlies tort law,[29] the normative power of tort law can hardly be denied.[30]

Indeed, the emphasis in Article 6:162(2) BW on normativity helps to achieve necessary normative progress. To illustrate this, consider the case law on the usage of asbestos in construction and the liability of employers when their employees developed lung cancer as a result.[31] It was generally known for a long time that asbestos had detrimental health effects, yet the government failed to draw up legislation regarding its use and the responsibility for its adverse effects. It was therefore necessary, in these liability cases, to resort to the standard of what according to *unwritten* law was *betamelijk* (a standard that has been codified in the BW by the democratically elected legislature).

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[25] Cf. Habermas, n. 21 above, p. 360.

[26] After all, under the rule of law, all legal entities, individuals and the state itself are bound by the law.

[27] For a more nuanced account, see A. Robertson & H.W. Tang, *The Goals of Private Law* (Hart, 2009), pp. 3–5.

[28] E.g., the European Union's Unfair Commercial Practices Directive corrects – usually through tort law, depending on national implementation – abuse of the vulnerability of consumers as party to contracts: Directive 2005/29/EC concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22.

[29] For a powerful argument that tort law (and private law in general) is based on corrective rather than distributive justice, see E.J. Weinrib, *The Idea of Private Law* (Oxford University Press, 2012). For a sophisticated argument on the intricate relationship between corrective and distributive justice in tort law, see J.L. Coleman, *Risks and Wrongs* (Oxford University Press, 2002). For an application of corrective justice to the remedy of injunctive relief under Art. 3:296 BW, see T. Nuninga, 'Recht, Plicht, Bevel, Verbod' (2018) 21(5) *Nederlands Tijdschrift voor Burgerlijk Recht*, pp. 152–62. For a discussion by the latter author on how this applies to the unwritten duty of care to prevent (climate) harm, see W.T. Nuninga & G.M. Veldt, 'Normstelling voor Deelverantwoordelijkheid in het Ongeschreven Recht', in A. Wissink et al. (eds), *Sluitertijd: Reflecties op het Werk van Jaap Hijma* (Wolters Kluwer, 2020), pp. 109–21. See also, e.g., M.A. Geistfeld, 'Hidden in Plain Sight: The Normative Source of Modern Tort Law' (2016) 91(6) *New York University Law Review*, pp. 1517–94.

[30] For an account of how *normativity* rather than sanctions in private law influences behaviour, see S.A. Smith, 'The Normativity of Private Law' (2011) 31(2) *Oxford Journal of Legal Studies*, pp. 215–42. The Hague District Court's ruling against Shell has even been heralded as reclaiming normative power by the constitutional democracy from private multinationals: C. Eckes, 'The Courts Strike Back: The Shell Case in Light of the Separation of Powers', *Verfassungsblog*, 15 June 2021, available at: https://verfassungsblog.de/the-courts-strike-back.

[31] I borrow this parallel from a conversation with Lodewijk Smeehuijzen, who discusses it in L. Smeehuijzen, 'De Veroordeling van Shell tot 45% CO_2-reductie in 2030: Over Legitimiteit en Effectiviteit' (2022) 8 *Nederlands Juristenblad*, pp. 540–8.

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If the standard had consisted of a reference to sectoral practices, it would have been impossible to hold employers liable, as at the relevant time the majority of construction companies used asbestos. *Betamelijk* instead invites a search for concrete indicators of normative consensus and, thus interpreted, relief for the employees could be reached. In short, it is doubtful to what extent sectoral practices are relevant as evidence of normative consensus when interpreting Article 6:162(2) BW.[32]

In this vein, the American Judge Learned Hand famously noted in the *Tj Hooper* case that an omission may be tortiously negligent even if it is common:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure … Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[33]

In sum, while judicial interpretation of unwritten tort law might require hovering between normativity and concreteness in a way that is similar to international law reasoning, an emphasis on normativity is more legitimate in tort law thanks to the national democratically legitimized constitutional legal order. In national tort law proceedings, this order actualizes[34] in rules of civil procedure – that is to say, in these proceedings, the open process for reasonable exchange between legal equals is secured by the rules of civil procedure.[35] In the next section I consider the Court's considerations in the light of these rules.

3. NO 'MISCHARACTERIZATIONS' OR 'MISCONSTRUCTIONS'

The central question in this section is how the District Court determined by *how much* Shell should reduce its GHG emissions. Why 45% by 2030 compared with 2019 levels? Mayer posits that the Court mischaracterizes a global target as a 'matter of scientific necessity' and applied this to Shell, thereby relying 'exclusively' on descending reasoning.[36] In this vein, Mayer alleges that the judgment is 'plagued by inconsistencies', mostly arising from 'four consecutive mischaracterizations and misconstructions'. I address these in Sections 3.1 to 3.4, respectively, and offer an alternative reading:

[32] The Hague District Court *did* look into the 'Oxford report', describing it in para. 4.4.18 of the judgment (n. 3 above) as an 'analysis of the various protocols and guidelines for climate change for non-state actors'. To look for concrete indications of a *normative* consensus is more in line with the demands of Art. 6:162(2) BW than looking into sociological/factual evidence of sectoral practices: University of Oxford, *Mapping of Current Practices around Net Zero Targets*, May 2020, available at: https://4bafc222-18ee-4db3-b866-67628513159f.filesusr.com/ugd/6d11e7_347e267a4a794cd586b1420404e11a57.pdf. This 'Oxford report' was used by the UNFCCC Race to Zero Campaign; available at: https://unfccc.int/climate-action/race-to-zero-campaign.

[33] *The TJ Hooper*, 60 F.2d 737 (2d Cir. 1932). I thank one of the anonymous reviewers for directing me to this telling quote.

[34] I borrow this verb from Habermas, who uses it, inter alia, to describe how self-understood legitimacy of the constitutional democracy functions in practice: Habermas, n. 21 above, p. 194.

[35] See also L. Burgers, 'Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-making in European Private Law Cases on Climate Change' (PhD thesis, University of Amsterdam (The Netherlands), Nov. 2020), p. 49, available at: https://dare.uva.nl/search?identifier=0e6437b7-399d-483a-9fc1-b18ca926fdb5.

[36] Mayer, n. 1 above, pp. 413, 416.

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the Court's order to Shell is the result of the debate between the parties to the action and of the rules of evidence, and its reasoning displays a balance between ascending and descending reasoning. I summarize the Court's reasoning in Section 3.5, reflecting on its use of human rights.

3.1. *Political rather than Scientific Consensus*

As a first alleged 'mischaracterization', the Court would see temperature targets as scientific truths rather than as a matter of political agreement. The Court writes:

> The goals of the Paris Agreement are derived from the [Intergovernmental Panel on Climate Change] IPCC reports. … [They] represent the best available scientific findings in climate science, which is supported by widespread international consensus. The non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change.[37]

The references to the Paris Agreement,[38] the 'widespread international consensus', and the 'universally endorsed and accepted standard' make it clear, in my reading, that the Court understands very well that temperature targets are laid down in legal agreements and, as such, represent the result of a political process informed by a number of factors, including climate science. The Court is looking for concrete signs of normative consensus on these goals.

3.2. *Justification of Chosen Reduction Pathway*

The second alleged 'misconstruction' concerns the Court's choice for an IPCC reduction pathway yielding a 50% chance of limiting global warming to 1.5°C and an 85% chance of limiting it to 2°C. Mayer submits that another, less ambitious pathway with a 66% chance of limiting global warming to 2°C would be an equally plausible interpretation of the Paris Agreement. The latter pathway would translate into a 25% GHG reduction target for the year 2030 rather than a 45% target. However, the Court's choice is far from a misconstruction, for two reasons.

Firstly, the Court is not interpreting the Paris Agreement, which would be out of place in this case between non-state litigants, considering that it is an international agreement with states as its primary addressees. Instead, the Court is finding an answer to what would be seemly/becoming/desirable (*betamelijk*) behaviour for Shell in societal interrelationships, by interpreting Article 6:162(2) BW. The Court observes that a large consensus exists that the desirable global reduction path should be set at 45% by 2030 compared with 2010 – the European Union (EU) and the Dutch state also use this pathway as their guide.[39] As the Court emphasizes, this does not directly translate into a legally binding norm,[40] and global reduction paths do *not* directly

[37] N. 3 above, para. 4.4.27.

[38] Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[39] Ibid., para. 4.4.29.

[40] Ibid.

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translate into an obligation for Shell as a non-state actor.[41] Rather, the Court is concretely reconstructing what is the normative consensus.

I understand the order imposed on Shell to reduce by 45% by 2030 to be the result of a question of evidence. Shell was unable to prove why it should deviate from the normative consensus on what is globally required. Surely, if the rest of society would be on its way to reduce significantly by more than 45%, Shell could perhaps continue to emit more, though it would still need to prove that it should, normatively speaking. Yet, sadly, overall emissions are still rising to an alarming extent.[42]

Secondly, I disagree with Mayer's contention that a reduction path with a 66% chance of limiting global warming to 2°C could be an equally plausible interpretation of the (indirect horizontal effect of the) Paris Agreement, which stipulates the aim of keeping global warming 'well below' 2°C in Article 2(1)(a). It would be great if we could afford to reduce emissions with only 25% rather than 45% by 2030, but we cannot. Perhaps the Court should have pointed out in more detail what will happen should the planet warm by 2°C.[43] The 'inconvenient truth' is that 2°C of global warming is already devastating, not least for the Netherlands, which lies largely below sea level. Even Shell itself writes in its summons to the Court of Appeal: '*Everyone* agrees' that a 45% reduction by 2030 is necessary to realize a maximum global warming of 1.5°C.[44]

Today, the climate has already warmed by approximately 1°C, and the resulting heatwaves are causing a considerable number of deaths.[45] Climate scientists agree that '[e]ven without the potential effects of climate change on waves and storm surge, sea-level rise alone is expected to lead to increases in coastal flooding and/or erosion', including in Western Europe.[46] Even applying low-emission scenarios, it is predicted that European glaciers will melt by 75 to 88% in volume during the coming century, leading to deadly, devastating floods and droughts.[47]

In short, 2°C of warming, and certainly everything above it, already poses an existential threat to inhabitants of the Netherlands. Against this background, even an 85% chance of limiting global warming to 2°C seems rather risky – indeed, this

41 Ibid., paras 4.4.32–36.

42 See, e.g., United Nations Environment Programme (UNEP), *Emissions Gap Report 2021* (UNEP, 2021), available at: https://www.unep.org/resources/emissions-gap-report-2021; I. Sognnaes et al., 'A Multi-model Analysis of Long-term Emissions and Warming Implications of Current Mitigation Efforts' (2021) 11(12) *Nature Climate Change*, pp. 1055–62.

43 Generally speaking, measuring global warming in degrees Celsius amounts to the greatest communication failure of the last two centuries: 2°C of difference just sounds so *little*. In Kim Stanley Robinson's cli-fi novel *New York 2140*, the severity of climate change is measured instead in 'hurricane Katrinas': K.S. Robinson, *New York 2140* (Orbit, 2018).

44 Appeal summons by Royal Dutch Shell, n. 17 above, para. 3.2.10 (emphasis added).

45 A.M. Vicedo-Cabrera et al., 'The Burden of Heat-related Mortality Attributable to Recent Human-induced Climate Change' (2021) 11(6) *Nature Climate Change*, pp. 492–500.

46 C. Tebaldi et al., 'Extreme Sea Levels at Different Global Warming Levels' (2021) 11(9) *Nature Climate Change*, pp. 746–51.

47 J. Bolibar et al., 'Nonlinear Sensitivity of Glacier Mass Balance to Future Climate Change Unveiled by Deep Learning' (2022) 13(1) *Nature Communications*, article number 409, available at: https://www.nature.com/articles/s41467-022-28033-0.

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percentage is not a matter of scientific necessity, but rather a watered-down political translation thereof, which the Court deems relevant in reconstructing normative consensus. A 66% chance to stay below 2°C would not be readily accepted by most people when presented with the facts; few people would want to step onto an aeroplane if they heard that one-third of all flights are crashing.

3.3. *Distribution of Mitigation Efforts across Various Sectors*

The third issue is the most specifically related to the alignment of the order to Shell with globally required targets. Mayer points out that 'emissions reductions inevitably unfold differently in various segments of the global economy'.[48] This remark is entirely correct. That is not to say, however, that the Court order is a 'misconstruction', again for reasons of evidence. The claimants have posited and proven that a 45% reduction would be in line with Shell's duty of care – Shell has not been able to dispute this convincingly.[49] Hence, the Court *had* to accept 45%, following the rules of Dutch civil procedure.[50] This means that it is, in principle, possible that a different reduction pathway may be the result of the debate among the parties when the case is decided by the Court of Appeal.[51] However, it does not mean that the District Court has not properly motivated its decision for 45% in 2030.

It goes without saying that legislatures are better placed than civil courts to determine who should reduce by how much, especially because of the equity considerations also noted by Mayer. The judgment could also be read as a call to the Dutch legislature to (finally) come up with more detailed guidelines for various actors in society at large, so as to ensure that the government's own target is achieved:[52] to reduce by 49% by 2030 compared with 1990 levels.[53] Indeed, the judgment is seen as a reaction to the legislature's 'failure to regulate'.[54] It goes beyond the scope of this brief response commentary to delve extensively into the legitimacy questions related hereto.[55] It is nevertheless worth noting that the Court *had* to make *a* decision, as refusal to render a decision can even lead to the prosecution of judges under Dutch legislation dating

[48] Mayer, n. 1 above, p. 414.

[49] N. 3 above, para. 4.5.2 (in which the District Court assesses Shell's climate mitigation efforts and concludes that Shell passively lets states and other parties play a leading role, whereas Shell has an obligation of its own).

[50] See Art. 149 Burgerlijke Rechtsvordering (RV) (Dutch Code of Civil Procedure), available at: https://wetten.overheid.nl/BWBR0001827/2022-01-01 (which stipulates that '[f]acts and rights that are posited by one party and not or not sufficiently disputed by the other party, have to be regarded as fixed by the judge').

[51] Indeed, Shell's appeal summons (n. 17 above) seems to have been argued in this direction, in particular para. 10.2.

[52] It is, in fact, read this way by the Dutch association of employers (VNO-NCW): O. McDonald & B. van Dijk, 'VNO-NCW: Klimaatrechtszaken Slecht voor Nederlandse Bedrijfsleven', 14 Feb. 2022, *Het Financieele Dagblad*, available at: https://fd.nl/bedrijfsleven/1430049/vno-ncw-klimaatrechtszaken-slecht-voor-nederlandse-bedrijfsleven.

[53] See Art. 2 Klimaatwet (Dutch Climate Act) of 2 July 2019, available at: https://wetten.overheid.nl/BWBR0042394/2020-01-01.

[54] W. Bonython, 'Tort Law and Climate Change' (2021) 40(3) *The University of Queensland Law Journal*, pp. 421–58, at 455; Smeehuijzen, n. 31 above.

[55] For the legitimacy of judicial lawmaking on climate change, see also Burgers, n. 35 above.

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from 1823.[56] Without question, the Court could have decided to reject the claim, but even Mayer calls the Court's establishment of a corporate duty to mitigate climate change 'convincing', as such.[57]

3.4. *Baseline Year*

The final alleged misconstruction, according to Mayer, is the choice of 2019 rather than 2010 as the base year to calculate by how much Shell should reduce GHG emissions. It is understandable that this choice comes across as surprising, but it is not inconsistent when appreciating the rules of Dutch civil procedure. That is, this was a choice made by the claimants,[58] and the Court cannot order more than what is requested by the claimants.[59] At the same time, this choice re-emphasizes that, indeed, the Court does not regard the IPCC reduction path of 45% compared with 2010 as 'a matter of scientific necessity', as discussed above in Section 3.1.

3.5. *The Role of Human Rights*

When interpreting the open norm in Article 6:162(2) BW, Dutch civil courts typically account for all the circumstances of the particular case to establish whether the norm has been violated, which boils down to an attempt to balance the interests involved. The Hague District Court took into account 14 such circumstances, including the UN Guiding Principles on Business and Human Rights (UNGPs)[60] and international climate law.[61]

Mayer contends that the reference to human rights treaties as one of the 14 circumstances taken into account by the Court is 'purely ornamental'.[62] I would disagree. Slightly simplified, the reasoning in the judgment may be summarized as follows: firstly, we know that global warming can violate human rights if it exceeds 1.5 to 2°C,[63] as had already been established in the *Urgenda* case;[64] secondly, as is clear from, inter alia, the

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[56] Art. 13 Wet Algemene Bepalingen (Dutch Law General Provisions) of 15 May 1825, available at: https://wetten.overheid.nl/BWBR0001833/2012-01-01; and Art. 26 RV, n. 50 above.

[57] Mayer, n. 1 above, p. 411.

[58] N. 3 above, para. 4.4.38.

[59] Art. 23 RV, n. 50 above.

[60] Office of the UN High Commissioner on Human Rights, 'United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', 2022, UN Doc. HR/PUB/11/04, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[61] N. 3 above, para. 4.4.2.

[62] Mayer, n. 1 above, p. 413. Mayer refers in passing to an article he authored in which he problematizes human rights as the legal basis for certain GHG reduction paths, and in which he submits, inter alia, that the right to life should lead to a more ambitious reduction path than the right to private life. I find this argumentation hard to follow, however: the same severe climatic event, say an inundation, is likely to cause the death of people as well as people's displacement; to prevent such events, the same reduction path can be applied; see B. Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115(3) *American Journal of International Law*, pp. 409–51, at 443.

[63] For the importance of the recognition of climate change as a human rights matter, see also L. Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law*, pp. 55–75.

[64] *Urgenda* v. *The Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015; See also J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will

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UNGPs, there is an international consensus on the duty of corporations to respect human rights – that is, to actively refrain from activities that violate human rights; hence, thirdly, Shell has an obligation to refrain from activities that cause the planet to warm by more than 1.5–2°C. Accordingly, the Court recognized the so-called indirect horizontal effect of human rights in Dutch private law,[65] a practice also referred to as 'consistent' or 'harmonious interpretation'.[66] In sum, the reference to human rights and the UNGPs is important for establishing both the existence and the content of Shell's climate obligation.

4. CONCLUSION

Am I unequivocally apologetic about the Court's decision? As a matter of fact, I am critical of some aspects of the judgment, including the denial of standing to the NGO ActionAid, which was also problematized by Mayer.[67] I also agree with Mayer's observation that, given that an English translation of the judgment was published immediately on the website of the Dutch judiciary,[68] the Court probably anticipated a global audience and could have engaged in more extensive motivation at specific places.[69]

On balance, however, I find the judgment rather convincing. I hope, with this response commentary, to have offered additional insights into the reasoning of the Hague District Court in supporting the injunction against Shell to reduce 45% of its GHG emissions by 2030, compared with 2019 levels. As Article 6:162(2) BW dictates, the Court sought concrete indications of a normative consensus regarding both the existence as well as the substance of a corporate obligation to mitigate climate change. It is for this reason that it included international climate law, human rights treaties, soft law principles in the UNGPs, as well as political assessments of climate science in its considerations. Rather than making non-binding norms 'binding' and using these sources as norms,[70] the Court is evaluating them as concrete indications of normative consensus.

The Court thus used descending as well as ascending reasoning. Relying more heavily on sectoral practices as a strategy to determine Shell's duty of care, as Mayer

Urgenda Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57, and B. Mayer, '*The State of the Netherlands* v. *Urgenda Foundation:* Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

65 For the indirect effect of international law in private law, see A. Hartkamp, *European Law and National Private Law: Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (Intersentia, 2016).

66 That is, judges interpret national law consistently or harmoniously with international law, where possible; see, e.g., A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011).

67 Mayer, n. 1 above, p. 409.

68 See in n. 3 above.

69 As was also noted by A. Hösli, '*Milieudefensie et al.* v. *Shell*: A Tipping Point in Climate Change Litigation against Corporations?' (2021) 11(2) *Climate Law*, pp. 195–209.

70 As hinted at by A. Nollkaemper, 'Shell's Responsibility for Climate Change: An International Law Perspective on a Groundbreaking Judgment', *Verfassungsblog*, 28 May 2021, available at: https://verfassungsblog.de/shells-responsibility-for-climate-change.

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proposes, would hollow out this duty in a way that is too apologetic for the normativity-laden legal domain of national tort law; a normativity that is, as I have argued, legitimized by the national constitutional democratic process. Indeed, given the warnings we hear from climate scientists, such an apology could lead to a true dystopia.

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