

# CLIMATE LITIGATION, HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

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## ABSTRACT

The aim of this paper is to understand how climate litigation may act as a mechanism to enforce the human rights protection in face of violations by transnational corporations. Initially, we reflect on the link between climate change, human rights, and enterprises. Climate litigation is then approached as an instrument for the enforcement of human rights, discussing its impacts and expansion. Finally, the case *Milieudéfensive et al. v. Royal Dutch Shell* is reviewed, and the action of the mechanism is discussed considering the violations arising from business activities. Adopting inductive reasoning, the qualitative research encompasses theory and praxis and brings together the techniques of document analysis, literature review and case study. Thus, climate litigation is an important instrument with extraterritorial effects for the protection of human rights in face of corporate actions, especially given the role it plays in holding transnational corporations liable: a global challenge that has been increasingly discussed. However, we concluded that the mechanism is not sufficient to solve the problem of liability, nor of human rights violations, making international

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cooperation necessary in order to adopt, among other measures, a binding rule that regulates the issue.

**Keywords:** climate changes; climate litigation; extraterritoriality; liability; transnational corporation (TNC).

## ***LITIGÂNCIA CLIMÁTICA, DIREITOS HUMANOS E EMPRESAS TRANSNACIONAIS***

### ***RESUMO***

*O objetivo deste artigo é compreender como a litigância climática pode atuar na condição de mecanismo de efetivação da proteção dos direitos humanos diante das violações provocadas por empresas transnacionais. Inicialmente, realizam-se reflexões acerca do vínculo existente entre mudanças climáticas, direitos humanos e empresas. Em seguida, aborda-se a litigância climática como um instrumento de efetivação dos direitos humanos, com discussão sobre seus impactos e expansão. Por fim, estuda-se o caso *Milieudefensie et al. v. Royal Dutch Shell*, momento em que é debatida a atuação do mecanismo em face das violações decorrentes das atividades empresariais. Adotando raciocínio indutivo, a pesquisa qualitativa engloba teoria e práxis e reúne as técnicas de análise documental, revisão bibliográfica e estudo de caso. Assim, tem-se que o litígio climático é um importante instrumento com efeitos extraterritoriais para a proteção dos direitos humanos diante da atuação de empresas, especialmente em razão do papel que desempenha na responsabilização de transnacionais: um desafio global que tem sido, cada vez mais, discutido. Entretanto, conclui-se que o mecanismo não é suficiente para solucionar o mencionado problema de responsabilização, tampouco de violação a direitos humanos, fazendo-se necessária cooperação internacional no sentido de adotar, entre outras medidas, norma vinculante que regulamente a questão.*

**Palavras-chave:** empresa transnacional (ETN); extraterritorialidade; litigância climática; mudanças climáticas; responsabilização.

## INTRODUCTION

Society has progressed in several areas. These advances, however, are mostly obtained at the expense of the environment. Climate change is just one of the consequences of this reality, exposing the impacts of human activities on nature and on human beings.

The global average temperature has suffered an unprecedented increase. The signs of this warming are felt all over the planet, such as extreme temperatures, melting glaciers, rising sea levels, and other events. As a result, the economy is being affected and human rights are being violated in an intergenerational dimension. There is a great chance that the situation will worsen in the coming years, because irreversible damage has already been done.

In this sense, if the economy and the guarantee of human rights are being affected by the current catastrophes, impacts of climate change will soon be devastating. This makes clear the urgency of this matter, and the need for international cooperation to adopt measures that actually promote mitigation and adaptation to this context.

The perception of the damage caused to the most basic rights starts moving the society, culminating in the incentive to and implementation of national and international climate policies. The problem lies, however, in its inadequacies in face of the complexity of environmental degradation. The plans and strategies currently adopted by most States do not match the commitments made at the international level. In addition, economic players, who are responsible for a significant portion of the world's pollution, are also underperforming.

It is in this context of inertia that mechanisms capable of promoting the protection of the environment and of human rights are sought, and climate litigation should be highlighted. Still missing a concept, this instrument with extraterritorial effects is being increasingly used. Stakeholders file both administrative and judicial lawsuits demanding, for example, that States and corporations to take a different stance and/or even the repair of damage that has already occurred.

Therefore, we seek to investigate how climate litigation can act as a mechanism to enforce the protection of human rights against violations caused by corporations, especially transnational corporations (TNCs), given the great difficulty in holding these actors liable. This research is based mainly on the analysis of the case *Milieudefensie et al. v. Royal Dutch*

Shell. The case was selected because of the paradigmatic decision handed down by the District Court of The Hague. The decision held, for the first time in history, a large group of companies liable for causing dangerous climate change to humanity.

Using qualitative research, the bibliographical technique is adopted, through research theoretically or empirically focused on the following topics: climate change, human rights, macroeconomics, and climate litigation. The analysis of reports and other international documents is also needed. A brief exploratory study is also carried out, starting with a survey of data on climate litigation cases, in order to show their increasing number in the last few years, and the reasons for this dissemination. Finally, we study the case of *Milieudedefensie et al. v. Royal Dutch Shell* which, through inductive reasoning, shall allow us to understand its performance as an instrument for the enforcement of human rights in face of violations committed by companies.

The text starts with reflections on the link between climate change, human rights, and enterprises. Climate litigation is then approached as an instrument for the enforcement of human rights, discussing its impacts and expansion. Finally, the case of *Milieudedefensie et al. v. Royal Dutch Shell* and the paradigmatic decision handed down by the District Court of The Hague are studied. This review, based on the concepts and other particularities presented, allows exploring climate litigation in the enforcement of human rights protection considering the damage caused by corporations to human rights, focusing on those that operate in more than one jurisdiction.

## **1 CLIMATE CHANGE, HUMAN RIGHTS, AND ENTERPRISES**

The impacts of climate change are so severe in some places that the most basic rights of individuals and communities are affected. Thus, this chapter aims first at reflecting on the relation between climate and human rights, focusing mainly on the legal instruments related to the matter.

Then, considering that economic activities account for a significant part of the world's pollution and that therefore their actors cannot be dissociated from this debate, both themes are related to business and the macroeconomic challenge of climate change. Finally, this paper addresses the need to adopt a binding global standard on human rights and business.

## 1.1 Climate and human rights: the ineffectiveness of the international legal regime on the matter

According to the IPCC report (2021), there is no doubt that human activities have caused the planet to warm up, and that some impacts are now becoming concrete. Everyone, in some way, contributes to the worsening of climate change, and it should be noted: everyone will be affected by it, even if on different scales (AVERILL, 2009). Thus, the relation between climate emergency and human rights is undeniable, even though it has only belatedly become part of international documents.

The international legal regime on climate change has progressed in four phases: (1) introduction in the international agenda of concerns regarding climate-related issues (1985 to 1990); (2) beginning of the negotiations to draft the United Nations Framework Convention on Climate Change (UNFCCC); (3) negotiation and elaboration of the Kyoto Protocol (1995 to 2005); and (4) after 2005, establishment of the global climate change agenda, marked by the development of instruments that culminated in the 2015 Paris Agreement (BODANSKY; BRUNÉE; RAJAMANI, 2017).

Documents that bring together both themes, climate and human rights, began to emerge only in the fourth phase presented, and the last agreement mentioned should be highlighted. It recognizes in its preamble “that climate change is a common concern of humankind” and thus “Parties shall, when adopting measures to address climate change, respect, promote and consider their respective human rights obligations” (UN, 2015, p. 2, free translation; CUNHA; REI, 2021).

The Paris Agreement is characterized as an important achievement in multilateral diplomacy.<sup>3</sup> Signed by almost 200 countries, it is the most relevant international step toward the containment of global warming (AR-TAXO; RODRIGUES, 2019). The Parties have assumed the commitment to meet established goals, so that all have responsibilities, even if differentiated in accordance with the reality and particularities of each State.<sup>4</sup>

The document presents as its main objective the maintenance of global temperature increase below 2°C, making efforts to limit it to 1.5°C, considering the levels before the industrial period. It seeks, thus, to “strengthen the global response to the threat of climate change”, based on the actions

<sup>3</sup> The great achievement is because it is an ambitious document that provides for obligations for all Party countries (BODANSKY; BRUNÉE; RAJAMANI, 2017).

<sup>4</sup> Principle of common but differentiated responsibilities, provided for in Article 2, 2, of the Paris Agreement (UN, 2015).

of the parties in face of the impacts resulting from these changes (UN, 2015, p. 2). However, a few years after implementation, there is a disparity between the responsibilities assumed and what is being effectively done (IMF; OECD, 2021).

In Brazil in 2021, for example, the Amazon region reported the largest deforestation in a period of approximately 10 years (TERRABRASILIS, 2022). This is evidence of the inadequacy of the measures adopted by the State in relation to the climate issue, the non-compliance with international instruments and the incompatibility with its responsibilities. This is a worrying situation, especially because the region is now a source of carbon as a result of fires, deforestation, and also climate change (GATTI *et al.*, 2021).

In a global perspective, data indicate that, in order to keep global warming at 2°C, according to the Paris Agreement, CO<sub>2</sub> emissions should not exceed 26 billion tons. However, if the current model of living continues, in less than 10 years (in 2030) emissions will reach about 37 billion tons and, consequently, warming will not be restricted to the intended temperature (IMF; OECD, 2021).

This context portrays the ineffectiveness of the international legal regime on climate change presented and, hence, the urgency of adopting adequate measures so that the implications of climate change do not continue worsening (RIANO, 2019). To this end, one cannot avoid addressing the relationship that climate change and human rights have with the economy and businesses, especially those that develop transnational activities.

## **1.2 Climate change as a macroeconomic challenge: the need for a binding global instrument on human rights and business**

Climate change is closely linked to the economy and business activities, and therefore States alone should not be responsible for addressing it. Joint action by all actors is necessary, as well as international cooperation to mitigate the situation and adopt measures aimed at adaptation (FERRARI; PAGLIARI, 2021; AMADO GOMES; SILVA; CARMO, 2020).

In 2021, a report was released on the Climate Economics Index, which reveals how climate change may affect 48 countries, representing 90% of the world economy. It was concluded that there would be significant economic damage to the global Gross Domestic Product (GDP), even if existing promises and targets on climate change were met. Calculations show that in the most optimistic scenario, losses, in terms of global GDP, could

reach 4% by the middle of this century. As a result, the document points out that there are no winners, given that the analysis indicates the occurrence of considerable economic damage, with no country being immune (SRI, 2021).

It is worth noting that losses due to climate change are believed to be not quantifiable and that, in addition to social and ecological damage, there are absurd losses both in economic and financial values (MILARÉ, 2019). The climate issue consists of one of today's macroeconomic challenges (CHAKRABARTI *et al.*, 2022; TIROLE, 2020; PLANT, 2020).

The statement above can be evidenced by the aforementioned data, which show the growing emission of CO<sub>2</sub> by countries in incompliance with the internationally established goals. Insufficient policies result from factors such as selfishness in relation to future generations and the free rider problem. Given this, it is observed that "the benefits associated with mitigating climate change remain essentially global and distant, while the costs of mitigation are local and immediate" (TIROLE, 2020, p. 213, free translation).

The concept of intergenerational equity was built considering that environmental degradation shall compromise natural resources and, therefore, their extraction in the coming decades. The concept consists of the right of the next generations to have access to the same resources as the current ones. However, the worsening of climate change configures a direct threat to this right (ARARIPE; BELLAGUARDA; HAIRON, 2019), reflecting the previously mentioned selfishness and absence of solidarity.

As for the free rider issue, it occurs when the one who has not borne any cost enjoys a certain collective good (FONSECA; BURSZTYN, 2007). Thus, some States identify that their green policies shall benefit, almost in their entirety, other countries and individuals who are not of this generation and, therefore, end up not internalizing the benefits of their policies to reduce their emissions, which remain insufficient, accelerating climate change and leading to the tragedy of the commons (TIROLE, 2020). In light of these considerations, we propose that the actors be held liable for global warming.

The essence of the climate issue lies in the reality that "economic agents do not internalize the damage they cause to other agents when they release GHGs". Thus, to solve the free rider issue, economists suggest, among other measures, forcing them to internalize the negative externalities related to their CO<sub>2</sub> emissions, by establishing carbon price compatible with the goal

of maintaining global warming between 1.5°C and 2°C (TIROLE, 2020, p. 226, free translation). However, beyond this, the need for adopting a binding normative instrument that provides for human rights and business at the global level is highlighted (ROLAND, 2018).

Since 1965, just 20 companies producing oil, coal, and natural gas are responsible for more than one-third of the world's GHG emissions (on average, 35% of the total) (HEED, 2019). Thus, large corporate groups are intensifying climate change and causing numerous human rights violations without showing concern for the situation. Several times they are not duly held liable for the damage caused (DEVA, 2020).

Despite the international documents that deal with human rights and business, they are all voluntary in nature (SENRA, 2019). Thus, there is no obligation toward complying with their provisions, leaving it up to each corporation to observe them or not. As already stated, business activities are profit-driven. In this sense, investment in issues such as production with fewer risks to the environment and human rights is only made if and while it is advantageous to the enterprise (SALAMA, 2008). Otherwise, there is a preference for risk-taking, especially when it comes to TNCs.

It should be noted that, when operating in a given State, the enterprise must abide by the country's rules. However, if there is any violation caused by indirect activity of a TNC based in a third state, rendering it liable becomes much more complicated and often ends up not happening (OLSEN; PAMPLONA, 2019). That said, damage to the environment and human rights is caused without transnational corporations bearing the costs and finding risk-taking more advantageous.

Therefore, it is necessary to adopt hard law that establishes the liability of these agents in addition to the existing soft law provisions. It is noteworthy that these do not concern a complete absence of regulation, because they bring contributions on the matter, albeit in a limited way, (NOLAN, 2013). Ideally, the instruments should be added together and not mutually exclusive (ROLAND, 2018).

However, while the internalization of negative externalities related to CO<sub>2</sub> emissions and the binding normative instrument of corporate liability are not implemented, different parties are filing administrative and judicial lawsuits, making use of climate litigation as a mechanism to enforce human rights protection.

## 2 GENERAL NOTIONS AND CONTEXTUALIZATION ON CLIMATE LITIGATION: A MECHANISM FOR HUMAN RIGHTS PROTECTION

The evident worsening of climate change and its impacts worldwide are mobilizing society to seek means of adaptation and mitigation. In response, climate litigation has been expanding at an astonishing rate (GOLNARAGHI *et al.*, 2021). This chapter seeks to expose the concept of this mechanism that is being built, address its growth globally, and also discuss its impacts.

### 2.1 Litigation as a means of mitigating climate change and its expansion globally

Climate litigation does not yet have a uniformly defined concept. However, the term has been used to describe “legal actions and administrative measures involving issues related to global climate change” with regard to *mitigation* based on the reduction of GHG emissions; *adaptation* by reducing vulnerability in face of the impacts of climate change; *loss and damage* through the remediation of losses incurred as a result of such changes; and *management*, referring to climate risks (SETZER; CUNHA; FABBRI, 2019).

Some authors adopt a narrower understanding, such as Markell and Rhul (2012),<sup>5</sup> and others, such as Peel and Osofsky (2015), take a broader view on the matter. They represent their concept of climate litigation by means of four concentric circles that will be further explained.

The center of the circles comprise: (1) litigations that have climate change as main focus; around it are: (2) the legal cases that approach such changes peripherally; (3) the lawsuits that had climate change as one of their motivations, but do not explicitly refer to it; and (4) those that, farther from the central point, do not directly address the issue, but whose outcome generates implications for mitigation or adaptation (PEEL; OSOFSKY, 2015). For the authors in question, a series of actions that are directly or indirectly related to the issue of climate change are included as climate litigation.

5 “We decided to define climate change litigation as any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts” (MARKELL; RUHL, 2012, p. 27).

The lack of an accurate concept has not prevented, however, the expansion of claims of this nature. In 2017, there were 884 cases in 24 countries;<sup>6</sup> by 2020, the number had increased to 1,550, in 38 countries<sup>7</sup> (UNEP; SABIN CENTER, 2020).<sup>8</sup> In other words, in an interval of about three years the number of climate litigation cases almost doubled. In consultation with information made available by the Sabin Center and Arnold & Porter<sup>9</sup>, 1,930 cases on climate change are currently<sup>10</sup> registered worldwide. They are mostly concentrated in the United States, with 1,389 cases, while the other countries have 541 disputes registered.

This expansion is occurring mainly as a result of the increase in national laws and policies on the subject, which provide plaintiffs with a basis for claiming mitigation and adaptation on the climate issue. It is also a result of the Paris Agreement, which brings these laws and policies in line with the global context and allows litigants to assess whether the commitments and actions of governments are adequate to its precepts. The expansion is also due to the need to protect constitutional human rights, given that inaction in the face of the climate emergency causes violations of these rights (UNEP; SABIN CENTER, 2020). Such dissemination extends to research on the subject.

In a literature review on climate litigation, 130 publications in English were analyzed for the period between 2000 and late September 2018. The growing academic interest in the matter was identified, mainly due to favorable decisions such as the paradigmatic *Urgenda v. State of the Netherlands*<sup>11</sup> case. The case not only boosted the research, but also stimulated the entry of several litigations into the same direction, being characterized as another reason that supported the expansion process portrayed (SETZER; VANALHA, 2019).

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6 Of the 884 cases, 654 are concentrated in the United States and the remaining 230 in 23 other countries.

7 Of the 1,550 cases, 1,200 are concentrated in the United States and the remaining 300 in 37 other countries.

8 Data as of July 01, 2020.

9 Both keep one of the largest climate litigation databases in the world, which can be accessed at: <http://climatecasechart.com>.

10 Data as of March 27, 2022.

11 It was the first successful climate litigation filed by citizens (represented by the Urgenda Foundation) against their own government. It is paradigmatic, among other things, because of its cross-border impact as an inspiration to new cases in other countries (TABAU; COUNIL, 2020). Link to access the decision: [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009\\_2015-HAZA-C0900456689\\_decision-4.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf).

It is noteworthy that, throughout this process, it is observed greater international attention to the link between human rights and climate (PEEL; OSOFSKY, 2018). It is in this context that we observe, on the part of the courts, an openness to framing the right to a stable climate as a human right (SETZER; CUNHA; FABBRI, 2019). Thus, the relationship between climate and human rights has not been restricted only to the text of international documents mentioned in the previous chapter, but is increasingly materializing mainly in the decisions of climate litigation.

It is also worth noting that binding States to their commitments is becoming a very common strategy. Thus, although companies are responsible for a considerable percentage of pollution, as discussed, governments are the most frequent defendants in this type of case. It becomes evident when accessing the database on non-US litigation, when it is found that out of 541 lawsuits only 68 are against companies, 9 of which are about misleading advertising, 10 about information provided, 17 about the reduction of GHG emissions, and 16 about environmental assessment and licensing.<sup>12</sup>

The claim to be approached in the following chapter is about the narrow universe of non-USA cases concerning actions brought against companies, specifically about mitigation of GHG emissions. It is believed that its paradigmatic decision will cause the number of lawsuits in this regard to increase, as it did under the influence of the litigation proposed by *Urgenda*. Before addressing it, however, the impacts of climate litigation in general should be identified.

## 2.2 Impacts of climate litigation

Consistent with the discussion above, the number of climate litigation is increasing in large proportions. This has occurred, among other things, in accordance with the moral and regulatory pressure they have exerted and the attention they have attracted (TOUSSAINT, 2020; SETZER; CUNHA; FABBRI, 2019).

Climate-related litigation typically has repercussions. This can be ratified by the example mentioned earlier: the *Urgenda v. State of the Netherlands* litigation, responsible for attracting such attention that the same strategy was followed in other countries. Given this scenario, it can be seen that climate litigation ends up influencing public opinion regarding the urgency of the matter that, in turn, forces an advance in governance at

<sup>12</sup> Data collected on March 27, 2022.

all levels (local, regional, and international) (CUNHA; REI, 2021; PEEL; OSOFSKY, 2015).

Considering this, cases of this nature are being used as part of a broader strategy to drive the progress of climate governance (LEHMEN, 2021; NUSDEO, 2019), and are of great importance to pressure legislators, policymakers, and economic actors to effectively develop and implement climate change mitigation and adaptation measures (UNEP, 2017).

A growing number of actions is getting high visibility aimed at “activating and legitimizing the institutions of the Judiciary as integral actors in the climate governance system”. The Judiciary “has the power of enforcement”, so it can “force the enforcement of measures that advance climate governance”. However, considering that lawsuits allow for challenging to the applicability of laws and/or protective measures, the impact of climate litigation “may be contrary to the development of policies that aim to promote a low-carbon economy” (SETZER; CUNHA; FABBRI, 2019, p. 28-29, free translation).

Therefore, processes may stimulate the development of regulation and governance, and may culminate in the weakening of laws and policies that seek to impose requirements on those who pollute or determine reduction targets. However, there is a trend toward the first scenario. In the United States, by way of illustration, from 1990 to 2016, the number of lawsuits opposing climate regulation was greater than the number of lawsuits seeking its protection (MCCORMICK *et al.*, 2018). However, from 2017 to 2021, figures have changed and litigation against climate regulation has become a minority, totaling only 11% (SILVERMAN-ROATI, 2021).

Thus, specifically regarding the States, it is identified that climate litigation can result in: (i) binding decisions requiring the adoption of new, more ambitious climate targets in line with national and international commitments; (ii) more comprehensive climate regulations; (iii) reforms in environmental impact assessments; and (iv) other procedures. For enterprises, on the other hand, climate cases can promote: (i) regulatory changes; (ii) delays or denials of proposed projects; (iii) injunctions for infrastructure adaptation; and (iv) massive compensation payments (UNEP; SABIN CENTER, 2020). Added to this list, based on the case under study, is the accountability for climate damage caused, and the need to adopt policies that conform to existing climate goals, such as those established by the Paris Agreement.

In view of this, the impacts of both State cases and corporate litigation

may have positive effects when it comes to the climate emergency, which, in turn, contributes to the protection of human rights in addition to ensuring compensation for violations that may be caused. However, it is reiterated that the current climate condition poses a macroeconomic challenge, requiring agents to redirect their activities. As previously stated, economy was and is responsible for much of the pollution that led to this situation, and everyone will be affected by its effects, including the very economic sector.

In light of the above, climate litigation is an important mechanism to promote mitigation and adaptation. It may also enforce the protection of human rights through judicial decisions that compel the defendant to comply with its commitments and/or to adopt more ambitious climate-related measures. There are two perspectives, and it should be understood that such an instrument can also result in opposite impacts, and promote setback in climate governance and regulation. In recent years, however, pro-climate actions have prevailed (SILVERMAN-ROATI, 2021). As an example, there is the case to be studied in the next chapter, in which an organization required a large business group to adapt its activities to the existing climate policies observing, among other documents, international soft law standards that deal with human rights and business (CLIMATE CASE CHART, 2019).

### **3 CASE STUDY: MILIEUDEFENSIE *ET AL.* VS. ROYAL DUTCH SHELL**

The Urgenda vs. State of the Netherlands litigation has sparked several lawsuits against governments. With respect to non-U.S. cases, such claims have become frequent, unlike those with corporations as a defendant. However, in May 2021 a paradigmatic decision was handed down involving the extra-territorial condemnation of an TNC, indicating that, as with the litigation proposed by Urgenda, it should stimulate other lawsuits related to companies and their responsibility in face of climate change and the protection of human rights.

Considering the possibility of filing new lawsuits along the lines of the Milieudefensie *et al.* Watson *et al.* V. Royal Dutch Shell<sup>13</sup>, and taking into account the matters addressed throughout this paper, after the presentation

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<sup>13</sup> Information about the litigation can be found in the database maintained by the Sabin Center and Arnold & Porter. Link to access: <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>.

of such litigation and the arguments of the parties, the decision of the District Court of The Hague and its possible implications will be addressed.

### 3.1 Presentation of the case and arguments of the parties

Using as precedent the case *Urgenda Foundation v. State of the Netherlands*, this litigation was proposed before the District Court of The Hague, located in the Netherlands, in April 2019, and a paradigmatic decision was handed down in May 2021 (NETHERLANDS, 2021). Still ongoing, *Milieudefensie*, representing more than 17,000 citizens, and 6 NGOs<sup>14</sup> (CLIMATE CASE CHART, 2019) appear as plaintiffs. As a party defendant, Royal Dutch Shell (RDS).

Overall, *Milieudefensie et al.* claim that the Shell group's business model poses a threat to the goals of the Paris Agreement, thus violating its legal duty of care and putting human rights and lives at risk. In light of this, it claims that the company is acting illegally (MILIEUDEFENSIE, 2019).

The plaintiff released a document with the main arguments that led to the filing of the lawsuit,<sup>15</sup> including the severe impacts of climate change given the geographical location of the country, which affect the most basic rights of the population. Data made available by the IPCC were emphasized, especially regarding the occurrence of irreversible implications if temperature exceeds 1.5°C (MILIEUDEFENSIE, 2019).

Furthermore, explained at an earlier point, companies release a large percentage of GHGs. Thus, *Milieudefensie et al.* argue that TNCs causes climate damage, accounting for 1.8% of all CO<sub>2</sub> ever emitted. They even report that at least since 1950 they are aware about the urgency of the climate issue, and their contribution to worsening the situation. However, no measures are being taken to address the problem. The ambition presented by the company on the environment in 2017 is insufficient, given that RDS presents the ability of fitting its business model into the existing climate goals (MILIEUDEFENSIE, 2019).

As a result of Shell's alleged indifference, it is claimed that it is breaching its duty of care. Provided for in Book 6, Section 162, of the Dutch Civil Code (NETHERLANDS, 1992), this legal institute is an open concept to be applied according to the concrete case. It is argued that corporations

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14 ActionAid NL, Both ENDS, Fossilvrij NL, Greenpeace NL, Young Friends of the Earth NL, Waddenvereniging.

15 It can be accessed via the following link: <https://www.foei.org/wp-content/uploads/2019/04/english-summary-of-legal-summons.pdf>.

should also respect human rights and not violate them, as they have been doing. Furthermore, the activities developed hurt the European Convention on Human Rights (ECHR)<sup>16</sup> (MILIEUDEFENSIE, 2019).

Royal Dutch Shell, in turn, claims that it is not up to the Judiciary to solve the issue, as it is a very broad claim of political nature. It mentions the need for a joint effort by society, since risks are caused by the totality of emissions, not only by those of the group that already adopts measures aimed at the environment. In addition, investment in oil is necessary at this point, and there is no legal basis to support the requests made (NETHERLANDS, 2021).

The economic impacts are also brought as an argument, which would be felt despite the uncertainties and the lack of an exact path to be followed. This whole issue, according to RDS, should be directed to the States, not to the companies, emphasizing that the ECHR does not bind the group. As for the duty of care, it states that its policies meet it (NETHERLANDS, 2021).

However, the defendant's statement was not enough to convince the District Court of The Hague, which believes that the economic group has responsibility for the climate emergency (NETHERLANDS, 2021). The decision handed down by that court will now be discussed, as well as the possible implications of this case. Finally, based on the content presented, the central object of this work will be discussed, leading to final considerations.

### **3.2 Decision of the Hague District Court and possible implications of the litigation for the protection of human rights violated by companies**

After reviewing the arguments presented by the parties, in May 2021 the District Court of The Hague issued a decision in favor of Milieudefensie *et al.*, ordering Royal Dutch Shell to reduce its CO<sub>2</sub> emissions by 45% until 2030, compared to 2019 levels, through corporate policy (NETHERLANDS, 2021). The decision therefore extends to all companies in the group in all their activities.

Although RDS has appealed<sup>17</sup> and there is still a procedural “path” to follow, the determination is paradigmatic. For the first time in history, a large economic group was held responsible for causing dangerous climate

<sup>16</sup> The violation occurs when it comes to the right to life (art. 2) and the right to respect for private and family life (art. 8).

<sup>17</sup> The appeal was filed in July 2021

change, and should collaborate to its mitigation by redirecting its activities, expressly matching the goals of the Paris Agreement, especially regarding the maintenance of global warming between 1.5°C and 2°C, considering the pre-industrial level (CLIMATE CASE CHART, 2019).

Initially, it is recognized that it is up to the District Court of The Hague to decide on the dispute, given the need for interpretation according to the concrete case of the duty of care provided for in the Dutch Civil Code. This should occur based on the analysis of relevant facts and circumstances, as well as the assessment of the broad international consensus on climate change, its impacts, and the need to respect human rights. There is nothing about matter directed exclusively to the legislative (NETHERLANDS, 2021).

In addition to the need to apply the mentioned instrument in accordance with the concrete situation (grounds presented in the decision), it is noted that the indispensability of the Judiciary action should also occur when there is a political gap (CARVALHO; BARBOSA, 2019). If the Legislative has not deliberated on an important matter that puts at risk basic rights, there is no other alternative to society but to resort to judicial provision. State failures require State decisions (ALBERTO; MENDES, 2019).

Previously, the link between climate change and human rights has been discussed, making clear the dependence of the guarantee of these most basic rights on climate protection, which has been increasingly emphasized. Specifically on the articles of the ECHR indicated by the plaintiff, the Court holds that it is not possible to resort to them directly. However, it indicates the value that human rights have in society and the unquestionable responsibility of companies to respect them. It also shows that these economic players should act in accordance with their protection that must be done, among other aspects, by adopting a position targeted to mitigating climate change and its effects (NETHERLANDS, 2021). It is also important to mention that all rights, in a universal perspective, are subject to liability by private entities (FACHIN, 2020).

Another aspect that deserves to be highlighted is the extraterritorial nature of the decision. In and of itself, mandating a company to reduce GHG emissions already presents beneficial transboundary effects. It is known that the pollution caused in a particular region is not restricted to that region, so much so that everyone is susceptible to its impacts, albeit unevenly. Likewise, the mitigation of these emissions shall also collaborate to reduce the effects of climate change globally. Moreover, in the case in

question there are explicit extraterritorial repercussions, since the decision handed down extends to all companies in the group, regardless of the state in which they are located (NETHERLANDS, 2021). This allows for much more comprehensive human rights protection.

The Court has emphasized that, indeed, the group's collaboration will not be sufficient to solve the climate problem, which has to be jointly tackled by the whole of society. However, this reality should not be used to exempt the RDS from its individual partial responsibility to collaborate in the reduction of GHG emissions, which cannot be assumed by the States alone, as had been claimed (NETHERLANDS, 2021).

It is reiterated that the climate issue is a macroeconomic challenge. However, considering the notion of rational maximization, as long as the redirection of business activities is understood as something that generates more harm than good, economic players will remain inert regarding the adoption of measures necessary to mitigate climate change. The judiciary plays an essential role in promoting human rights in the absence of strong climate institutions.

In view of this, the decision states that the Shell group's business plans need to be updated in line with its climate ambitions, as existing intentions are largely characterized as rather intangible, undefined, non-binding plans in the long term (2050) and non-existent in the short term (2030). It was found that the policy adopted is conditional on the pace at which society moves toward the goals set out in the Paris Agreement, as if the States and other parties should play a pioneering role only for the group to act accordingly later. But by failing to take action even if it is possible, Royal Dutch Shell disregards its individual responsibility (NETHERLANDS, 2021).

For the duty of care to be truly observed, the Court ordered RDS to reduce its CO<sub>2</sub> emissions by 45% until 2030, compared to 2019 levels, thus complying with the Paris Agreement, even though the group is not officially part of the negotiation (NETHERLANDS, 2021). Based on this determination, considered a milestone (PIRES; PAMPLONA, 2022), and the debate held so far, we can identify how climate litigation can be used as an extraterritorial instrument for the protection of human rights in face of violations by companies.

As already exposed, the case *Urgenda Foundation v. State of the Netherlands* was responsible for attracting attention and, as a consequence, for stimulating the filing of lawsuits with the same strategy. Similarly, the decision in *Milieudefensie et al. V. Royal Dutch Shell* has the potential

to influence public opinion regarding the urgency of the problem and trigger new cases with the same content, namely, mitigation of climate change by companies and protection of human rights, cooperating with the advancement of governance at all levels (PEEL; OSOFSKY, 2015). In fact, this phenomenon can already be identified because, in a period of less than seven months, the number of litigation against companies has increased from 51 to 68, and from 10 to 17 cases concerning the reduction of GHG emissions.<sup>18</sup>

The aforementioned incentive and the actual collaboration by corporations that, it is reiterated, are responsible for a significant portion of GHG emissions in the world and for the violation of essential rights, will make the goals of the Paris Agreement more tangible, achievable, and will allow strengthening the role and responsibility of these actors (CARVALHO; BARBOSA, 2019). In this sense, the decisions that impose on groups of companies, along the lines of the determination studied, the reduction of CO<sub>2</sub> emissions will promote the effectiveness of the Paris Agreement, culminating in the softening of the climate issue, and also in the effective protection of human rights.

Finally, however, it is highlighted that climate litigation only “makes sense as a strategy for strengthening climate governance and never, either directly or indirectly, for promoting climate belligerence as an end in itself” (MILARÉ, 2019, p. 6, free translation). It should also be understood that climate litigation is not a sufficient mechanism for corporate accountability and the consequent protection of human rights. It is an instrument that has proven to be effective, according to the data presented, but that should be in the background before the implementation of an international norm of binding nature that regulates the subject.

## CONCLUSION

Climate change is a global issue. It does not stop at borders, nor does it limit its effects to a specific group, but it affects society as a whole. Human rights are being violated and the economic sphere, which degrades the environment so much, is doomed to its implications. Thus, it is impossible to discuss solutions for the current scenario without addressing the role of enterprises, especially those that develop transnational activities.

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<sup>18</sup> The first data were collected on September 5, 2021. The most recent data were collected on March 27, 2022 from the Sabin Center and Arnold & Porter database. Link to access: <http://climatecasechart.com>.

Reviewing the results of corporate action we identified, among other measures, the need for internalization of negative externalities, as well as the establishment of a globally binding normative instrument on human rights and business. However, until these measures are implemented, and while violations of basic rights continue to be frequently evidenced, different parties are filing administrative and judicial lawsuits, thus making use of climate litigation as a mechanism to enforce the protection of human rights.

Climate litigation and its literature have expanded surprisingly. This is due to: (i) the increase in national laws and policies related to the matter; (ii) the Paris Agreement outcome; (iii) the incentive generated by certain paradigmatic cases; and (iv) the search for human rights protection. As one of its main impacts, it is worth highlighting the advancement of climate governance at all levels (local, national, global). However, there are two sides to the coin, so that litigation can also lead to the rollback of regulations and of climate governance. Even so, they have considerable relevance and are necessary in the current situation for the protection of human rights in face of violations by corporations.

In this sense, in order to better understand how they function as a mechanism for human rights protection in face of damages caused by TNCs, we analyzed the case of *Milieudefensie et al. V. Royal Dutch*, especially its paradigmatic decision handed down in May 2021. Although still ongoing, the case allowed for an interesting debate on its possible implications, such as: (i) strengthening of climate governance; (ii) filling of a political gap; (iii) incentive for other litigations with the same strategy; (iv) effectiveness of the Paris Agreement; and (iv) effective protection of human rights, based on the accountability of transnational corporations, especially because of the evident extraterritorial aspect of the decision, in the sense that the conviction extends to the entire RDS group, thus involving companies that are in the most diverse countries of the world.

We conclude, however, that climate litigation should not be viewed as a sufficient mechanism for rendering TNCs accountable for the violations they cause. In fact, in addition to other measures, there should be international cooperation to establish a binding standard on the relationship between human rights and business. This should be the main instrument that dictates the responsibility of the actors in question, so that litigation should take a back seat, with the Judiciary being called upon in cases of

non-compliance with the binding provision. Through joint action, the protection of human rights can be adequately enforced.

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