The PETL and corporate liability for greenhouse gas emissions: duties and remedies

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Abstract: How can tort law contribute to combatting climate change? The Principles of European Tort Law (PETL), in particular the framework of art 4:102 PETL, have already served as inspiration for a duty of care for both governments and companies, aimed at reducing greenhouse gas emissions. This is in line with the development of law in Europe, where liability for an insufficient contribution to combatting global warming is becoming increasingly concrete. The PETL, therefore, do not necessarily need to be amended on this point. However, the development could be strengthened in two ways. First, it is proposed to amend art 4:102(3) PETL, providing that the duty of care may be determined in part by reference to internationally recognised fundamental rights and international documents that constitute a breach of duty for companies. Secondly, making room in the PETL for injunctive relief would do justice to the need to take preventive measures, as, in climate cases, preventing global warming is more urgent than ex post compensation.

I Global warming in the pipeline

The threat of global warming is greater than assumed by the drafters of the Paris Agreement (2015) and various Intergovernmental Panel on Climate Change (IPCC) reports. The effects of previous and current greenhouse gas emissions on the climate are, by nature, delayed. They will be more severe than previously believed. A greater amount of climate change is 'in the pipeline'. What should we do? It is vital to make carbon-free energy available, abundant and affordable. Carbon emissions should be discouraged by raising the price of greenhouse gas emissions. A rising

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carbon price creates a level playing field for energy efficiency and renewable energy.[1]

What can tort law contribute to this? It may serve as a basis for an obligation to cooperate in the vigorous reduction of greenhouse gas emissions to zero and the development of carbon free energy sources. Do the Principles of European Tort Law provide such a basis? Taken literally, the answer must be in the negative. Indeed, the Principles are a collection of abstract notions, representing the core of what different systems of tort law in Europe have in common. Apart from a very specific and concrete notion like 'death', they do not contain any reference to flesh-and-blood situations, let alone to causes of global warming and what is expected of companies in this respect.

Take art 4:103 PETL, which provides for a duty to take positive action to protect others from harm if the actor creates or controls a dangerous situation or if the seriousness of the harm, on the one hand, and the ease with which the harm can be prevented, on the other, point towards such a duty. And take art 5:101(1) PETL, according to which the person who engages in an abnormally dangerous activity is strictly liable for damage characteristic of the risk posed by the activity and resulting from it. These are abstract texts. The question arises whether we can use them in the context of contributions to global warming. Can the production and sale of petrol be classified as an abnormally dangerous activity? On the face of it, we do not know. But now that we know the effect of the use of fossil fuels on global warming and what it means for life, physical or mental integrity, human dignity and freedom – which enjoy the most extensive protection under art 2:102(2) PETL – we see that a positive answer is within reason.

One might wonder whether the gravity of the situation would justify the PETL explicitly expressing the legal responsibility of companies to contribute to the reduction of greenhouse gas emissions. On the one hand, one would say yes, as that responsibility takes shape in Europe (part II). On the other hand, one could argue that the PETL already offer a framework that could serve as a basis for such a responsibility. In this context, and in honour of Bénédict Winiger and his fellow founders of the Principles of European Tort Law, part III will show that the PETL may serve and actually have served as a source of inspiration in the *Urgenda* case, in which the State of The Netherlands was ordered to offer protection against the consequences of greenhouse gas emissions. Indirectly, the same goes for the *Milieudefensie v Shell* case, in which a company was held liable for the lack of progress in cutting greenhouse gas emissions. Finally, in one respect it is questionable whether

1 *James E Hansen et al*, Global warming in the pipeline (2023) Oxford Open Climate Change 3(1), 25f.

the PETL provide an expedient instrument for combatting climate change, because of their focus on compensation (part IV).

II Climate change is a concern for companies in Europe

In Europe, companies should not only act in the interests of shareholders, but also consider the interests of stakeholders and society as a whole. Starting point is the European Commission policy document on the responsibility of companies for the impact they have on society.[2] First and foremost, companies must comply with national laws and regulations, but their social responsibility extends further. They are expected to organise their business in such a way that they can identify the impact of their actions on society. In the course of this process, they should listen to their stakeholders, that is, individuals and organisations that have an interest in or are affected by the companies' actions. They should incorporate the findings into their corporate decisions, with an ambitious goal of 'maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large' and of 'identifying, preventing and mitigating their possible adverse impacts'.[3]

The value a company creates, or at least the value its owners or shareholders share with other stakeholders and society as a whole, should be maximised. That is an appealing perspective, but it offers little direction. The enterprise that works to maximise shared value will find that the weighting of interests is largely political. The world needs to get rid of fossil fuels, but for now they are badly needed to keep daily life and work functioning. So how do you decide who should do what, where and when first? In this situation, there is a tendency to wait for the government to take the lead.

More tangibly, any negative consequences should be identified in advance, and then precautions taken for prevention or mitigation. Here too, a debate lurks, for example on the question of which interests are relevant and how and to what extent a company must meet them. To this end, the European Commission refers to various principles and guidelines developed by international organisations, for example the United Nations Guiding Principles on Business and Human Rights.

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2 Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011–14 for Corporate Social Responsibility, 25 October 2011, COM (2011) 681 (EU CSR Policy).

3 Ibid, 6.

In 2011, the United Nations Commission on Human Rights adopted a set of principles that provide guidelines for businesses, aimed at preventing and dealing with risks of human rights violations resulting from their business decisions:

> 'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'[4]

The remarkable thing about these guidelines is, still, that they brought human rights – which are addressed to States – into the domain of businesses. These flesh out the research that companies should conduct with regard to the effects of their business decisions and the consequences they should attach to the results.

The European Commission also refers to the 2011 Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development. On 8 June 2023 these Guidelines were updated and renamed the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (in short: OECD Guidelines 2023). The following will draw mainly from the Guidelines 2023.[5]

The Guidelines are interesting not only because they address multinational corporations' concern for human rights, but also because multinational corporations' compliance with them can be raised in a grievance procedure. All OECD member states have established a National Contact Point (NCP), where stakeholders can file a complaint about non-compliance or inadequate compliance with the Guidelines. The NCP attempts to bring parties together. If unsuccessful, it evaluates the complaint according to the Guidelines.

The Guidelines emphasise that companies play a key role in making the economy more sustainable and in addressing local and global environmental challenges, 'including the urgent threat of climate change'.[6] They strike a prescriptive tone:

> 'Within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, enterprises should conduct their activities in a manner that takes due account of the need to protect the environment, and in turn workers, communities and society more broadly, avoids and addresses adverse environmental impacts and contributes to the wider goal of sustainable development. Enterprises can be involved in a range of adverse environmental impacts. These include, among others: a) climate change'.[7]

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4 UN Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/4, 11.

5 <https://doi.org/10.1787/81f92357-en>, accessed on 17 November 2023 (hereinafter: Guidelines 2023).

6 Guidelines 2023 (fn 5) 33.

7 Guidelines 2023 (fn 5) 33.

They refer not only to the existing legal framework, but also to 'relevant international agreements, principles, objectives and standards'. According to the Commentary, the Guidelines refer to the UN Framework Convention on Climate Change and the Paris Agreement.[8]

They recommend a 'precautionary approach' to be implemented at the level of enterprises. Companies should take this principle to heart:

> 'The basic premise of the Guidelines is that enterprises should act as soon as possible, and in a proactive way, to avoid adverse environmental impacts.'[9]

However, since international environmental agreements are not explicitly addressed to enterprises, the Guidelines are formulated with restraint:

> 'It is recognised that some flexibility is needed in the application of this approach, based on the specific context in which it is carried out. It is also recognised that governments determine the basic framework in this field in light of their capabilities and have the responsibility to consult periodically with stakeholders on the most appropriate ways forward, ensuring transparency and a science-based approach'.[10]

More specifically, the Guidelines recommend that companies continually seek to improve their environmental performance, not only within their own operations but also in their supply chains.[11] Inside and outside companies, they should strive to develop and provide products or services that do not have excessive environmental impacts and reduce, for example, greenhouse gas emissions. They should make their customers more aware of the environmental impacts of using the company's products and services, for example, by providing accurate information about their products in relation to greenhouse gas emissions. They should look for ways to improve the company's long-term environmental performance, for example, by developing strategies for emission reductions. They should evaluate their efforts. The Guidelines add that companies should provide a recovery mechanism:

> 'providing for, or co-operating in, remediation as necessary to address adverse environmental impacts the enterprise has caused or contributed to, and using leverage to influence other entities causing or contributing to adverse environmental impacts to remediate them'.[12]

In addition, they should provide a helping hand to their trading partners in their attempt to make their enterprise more sustainable by:

8 Guidelines 2023 (fn 5) 35.
9 Guidelines 2023 (fn 5) 37.
10 Guidelines 2023 (fn 5) 37.
11 Guidelines 2023 (fn 5) VI.5.
12 Guidelines 2023 (fn 5) VI.1 at e.

> 'Providing support, including capacity building on environmental management, to suppliers and other business relationships, particularly small- and medium-sized enterprises and small holders, where appropriate and feasible'.[13]

Moreover, it is considered inappropriate for companies to rely on a lack of absolute scientific certainty to postpone cost-effective measures. On the contrary, if there is a risk of serious damage to the environment, they should, also for the sake of human health and safety, prevent the danger from materialising or mitigate its effects.[14]

Given all these insights, the Guidelines offer starting points for developing a standard of care for companies aimed at reducing greenhouse emissions.

Yet the Guidelines also have their limitations. Some of the complaints filed – worldwide – relate to the responsibility to reduce greenhouse gases. The Australian NCP summarised the state of play in its 15 December 2021 Final Statement, following a complaint against a bank. It compares the focus on climate change to the focus on human rights:

> 'This shows those considering and drafting the amendments (which became the 2011 Guidelines) were well aware of climate change and the call for this to be addressed in the Guidelines. The 2011 amendments inserted extensive provisions in relation to human rights. This demonstrates those governments had no aversion to agree and incorporate detailed requirements for enterprises in the Guidelines. The fact that so few amendments were made detailing expectations regarding climate change suggests an absence of agreement about what those requirements should be. Expert commentary in 2018 reinforced this: "certain important themes in the space of business and society are not at all explicitly addressed in the 2011 Guidelines ... such as climate change". All this cautions against interpreting more specific requirement of companies around climate change which were not specified in the 2011 amendments'.[15]

Restraint is thus required, the Australian NCP argues, also because the actions of the accused companies should be assessed in light of the text of the 2011 OECD Guidelines, even though the explanatory notes to the 2011 OECD Guidelines and other OECD documents could contribute to the understanding of the 2011 OECD Guidelines. The Australian NCP therefore deliberately ignores the Explanatory Notes to the 2011 OECD Guidelines, which provide in para 69 that companies should take steps as soon as possible and in a proactive manner to prevent, for example, serious or irreparable environmental damage resulting from their activities:

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13 Guidelines 2023 (fn 5) VI.6 last sentence.

14 Guidelines 2023 (fn 5) VI.3.

15 *Australian NCP*, Complaint of Friends of the Earth, Egan, Dodds and Simons on the Australia and New Zealand Banking Group Ltd (15 December 2021) at 38. <https://ausncp.gov.au/sites/default/files/2021-12/AusNCP_Final_Statement_Friends_of_Earth_0.pdf>, accessed on 14 November 2023.

> 'The Commentaries, which are published with the Guidelines, are separate to the Guidelines, as explained by the OECD's 2011 publication containing both. The commentaries on the OECD Guidelines for Multinational Enterprises have been adopted by the Investment Committee in enlarged session, including the eight non-Member adherents... to provide information on and explanation of the text of the Guidelines for Multinational Enterprises and of the Council Decision on the OECD Guidelines for Multinational Enterprises. They are not part of the Declaration on International Investment and Multinational Enterprises or of the Council Decision on the OECD Guidelines for Multinational Enterprises.'[16]

According to the Australian NCP, neither the 2011 OECD Guidelines nor the reports of other National Contact Points on climate issues provide much direction:

> 'In summary, then, there is limited specificity in the Guidelines' wording about climate change and what companies should do. It would be imprudent to endeavor to summarize or re-phrase those provisions.'[17]

It concludes that the 2011 OECD Guidelines must be brought up to date:

> 'This Statement has noted the increasing awareness that the Guidelines' text around climate change and environmental expectations of companies is behind current practice. This is an issue canvassed as part of the OECD's public consultation on its "draft stocktaking report" which forms part of its continuing stocktaking exercise. The Independent Examiner recommends this Final Statement be brought to the attention of the OECD and its advisory bodies to the Investment Committee (BIAC and TUAC) together with OECD Watch. In particular, all parties should consider the limited text in the Guidelines, about due diligence for climate change by investors and any companies, and the implications of that for NCPs in promoting the Guidelines and managing specific instances.'[18]

The possibilities offered by the 2011 OECD Guidelines appear to be broader than the Australian NCP suggests.[19] The Guidelines are open-ended in their wording and sometimes require interpretation by the companies concerned, including by referring to current developments, as explicitly provided for in recommendation VI.1(b). Moreover, in the OECD Guidelines 2023, Recommendation VI (on the environment) explicitly refers to the commentary to the recommendation:

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16 *Australian NCP* (fn 15) 40.

17 *Australian NCP* (fn 15) 41.

18 *Australian NCP* (fn 15) 75. Compare the Dutch Nationaal Contactpunt 19 April 2019 (*Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie/ING*) at 5.5.

19 It is the responsibility of the OECD Investment Committee to issue clarifications of the Guidelines; see Guidelines 2023 (fn 5) 59–61.

> 'Important differences across environmental impacts are outlined in the commentary to this chapter, including with respect to climate change and how an individual enterprise's relationship to such impacts should be considered in the context of relevant frameworks.'[20]

Thus, the suggested distinction between the recommendations and the commentary on them is not as sharp as the Australian NCP suggests.[21] However, it is undeniable that the 2011 OECD Guidelines provide little direction in climate matters. Companies have to define their climate goals with the only cue that these must be consistent with national policies and international environmental agreements.[22] Compared to the Guidelines 2011, the OECD Guidelines 2023 go a little further and provide some guidance on how to implement the goals. They refer to international commitments, multilateral agreements and other regulatory frameworks, representing an important benchmark for understanding environmental issues and expectations. Even if such documents are not written for individual companies, they can provide support:

> 'Some international agreements contain collective government objectives and may not provide detailed prescriptions regarding the responsibilities of individual enterprises in relation to such objectives. In such cases, relevant regulatory frameworks, national policy and widely recognized standards of environmental management and safeguards, and scientific evidence are important references.'[23]

According to the OECD Guidelines 2023, a company's duty of care could also be linked to the UN Framework Convention on Climate Change and the Paris Agreement. Thus, corporate social responsibility, as defined by the European Commission in 2011, urges companies to formulate their own climate goals, first on a voluntary basis – but, since then, these recommendations have taken on a normative character. Rules that apply to States may serve as a frame of reference for corporations.

This is all the more compelling now that various elements of the European Commission policy and the OECD Guidelines are now codified in European legislation. Reporting rules will have to be adapted to the EU Directive on the obligations of listed and large companies to report on their sustainability policy and perfor-

20 Guidelines 2023 (fn 5) 33.

21 See, for example, the German Nationale Kontaktstelle 20 November 2007 (*Germanwatch*/*Volkswagen*) and the Dutch Nationaal Contactpunt 19 April 2019 (*Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie*/*ING*); they take the commentary into account.

22 Guidelines 2023 (fn 5) VI.1 at b.

23 Guidelines 2023 (fn 5) 35.

mance.[24] They are required to provide a concise overview of their business model and strategy, including information such as planned actions, financial considerations, and investment strategies, to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119. Information regarding their exposure to coal-, oil- and gas-related activities is also to be provided.[25]

Also in the pipeline is a European directive on appropriate due diligence in the business environment and human rights.[26] The proposal for a directive follows the core of the United Nations Guiding Principles on Business and Human Rights, 2011 (UNGP) and the OECD Guidelines 2011. The major difference lies in the fact that compliance with the rules of the proposal, once implemented in national law, will not be voluntary. Furthermore, the proposal seems to be moving towards compensation for injured parties as a sanction for failure to comply.

The proposal provides a horizontal framework applicable to – in short – large companies located (art 2(1)) or operating (art 2(2)) within the European Union, regardless of the economic sector in which they operate. These enterprises are obliged to identify (art 6), prevent (art 7) and eliminate or minimise (art 8) current and potential negative impacts on human rights and the environment (art 4(1)). Here we are concerned with the effects not only of the company's own activities or those of its subsidiaries, but also those of business partners in the chains of its activities (art 1 para 1 sub a). Among other things, companies are required to try to obtain contractual guarantees from their direct business partners that they will ensure compliance with its code of conduct and sustainability plans (art 7(2)(b)) and to obtain corresponding contractual guarantees from their partners, insofar as their activities form part of the company's chain of activities. Any company that fails to comply with these rules is liable for any damage suffered as a result (art 22).

These obligations focus on both the adverse human rights impact on protected persons resulting from the violation of one of the rights or prohibitions as enshrined in international conventions and the adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to

24 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] Official Journal (OJ) L 322/15.

25 Art 1 (Amendments to Directive 2013/34/EU), art 19a (2) at a (iii).

26 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, of 23 February 2022 (COM(2022) 71 final 2022/0051 (COD).

international environmental conventions, listed in the Annex to the draft. Neither climate change issues nor the Paris Agreement are mentioned in the Annex.

For this reason, the question has been raised whether the framework of arts 6, 7, 8 and 22 of the draft directive will apply in the context of climate change.[27] The question is legitimate. Article 29, para 1, point (d) seems to suggest that the framework of arts 6, 7 and 8 does not cover combatting climate change. Furthermore, the draft directive has a specific provision devoted to the obligations of companies with regard to climate change. Companies must adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement, identifying the extent to which climate change is a risk for, or an impact of, the company's operations (art 15).

Still, whereas combatting climate change is regarded as a matter of human rights, in particular the right to life, we face a concurrence of obligations. Were one to blindly apply the maxim *lex specialis derogat legi generali*, art 15 would have to supersede the framework of contractual assurances. It has been argued in detail, however, that in European law, the maxim *lex specialis derogat legi generali* does not serve as a sound rule to decide cases of concurrence of legal rules:

> 'Indeed, it appears that the scope of application of one rule is only affected by another rule if the Union legislature explicitly asserts that this shall be the case. Case law shows that, in absence of contraindications, the Court of Justice assumes that each Union rule must be considered on its own merits.'[28]

Hence, there is no explicit indication in the Directive that art 15 is intended to supersede the framework of arts 6,7, and 8.[29] Given the human rights approach of climate change liability, it is arguable that the contractual assurances should include combatting climate change.

Thus, the legal responsibility of companies to contribute to the reduction of greenhouse gas emissions is taking shape in Europe. We will now turn to the question of whether the PETL framework is fit for integrating the European framework.

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27 *EFD Engelhard*, Naast woorden meer daden. Naar een 'due diligence'-klimaatplicht voor ondernemingen? (2023) Nederlands Juristenblad (NJB) 1239, at 3.2.

28 *R de Graaff*, Concurrence in European Private Law (2020) 137.

29 The European Parliament has suggested to erase the reference to climate change in art 29, para 1, point (d), and considers the development and implementation of a climate transition plan according to art 15 an appropriate measure to prevent adverse environmental impacts related to climate change mitigation pursuant to art 7(1); see amendments to art 7(2), point (a) and to art 8(3), point (b) of the Proposal.

III Two cases integrating the European framework in tort law

A The *Urgenda* case

Take for example the *Urgenda* case. The District Court of The Hague ordered the State of the Netherlands to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, to achieve a reduction of at least 25 % by the end of 2020 compared to the 1990 level.

The case had been filed in the civil court. The Dutch Civil Code is applicable to acts of the State and the government. The special position of the State must be taken into account in shaping the standard of conduct to which it must conform. In its actions, the State is obliged to take the general principles of proper administration into account. In certain respects, the State is expected to be more diligent than private parties. Also, the State must be able to direct its actions within the margin of its freedom of policy and assessment.

Obviously, there is tension between the roles and responsibilities of the government on the one hand and the judiciary on the other. In the *Urgenda* case, the State argued that it is for politicians to decide on reducing greenhouse gas emissions. The Supreme Court explicitly addressed this tension between politics and courts in its judgment. The Dutch Constitution requires the judiciary to apply the provisions of the European Convention on Human Rights (ECHR). The judge must provide legal protection and this is an essential part of a democratic constitutional State. In doing so, the court observes constitutional limits: it will not apply legislation that conflicts with treaty law, but it will never oblige the State to enact legislation with a specific content.[30]

This injunction was based on a legal duty, more specifically the unwritten standard of care that requires persons to refrain from exposing others to a hazard greater than what is reasonable in the given circumstances. A breach of this duty of care is considered an 'unlawful act', defined in art 6:162, sec 2 of the Dutch Civil Code: an act or omission breaching a rule of unwritten law pertaining to proper social conduct.

The District Court of The Hague explicitly relied on this framework. The main question was whether or not the State's current climate policy was in line with its duty of care. According to the District Court, the answer depends on whether, according to objective standards, the reduction measures taken by the State to prevent

30 Hoge Raad (Supreme Court, HR) 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*) at 8.2.1–8.2.6.

hazardous climate change for society and the environment are sufficient, also in view of the State's discretionary power, that is the discretion of the State to execute its public duties – with due regard to public law principles.[31] In determining the scope of the duty of care of the State, the District Court referred to the points of view that have been developed in the hazardous negligence case law in order to examine the duty of care.[32] It took into account: (1) the nature and extent of the damage ensuing from climate change; (2) the knowledge and foreseeability of this damage; (3) the chance that hazardous climate change will occur; (4) the nature of the acts (or omissions) of the State; and (5) the onerousness of taking precautionary measures.

Seeking a thorough understanding of the reasons offered by the District Court, Procurator General Langemeijer and Advocate General Wissink noted in their conclusion to the Supreme Court in the *Urgenda* case:

> 'In this respect, it is relevant that (these factors) are in line with basic notions about handling risks. They are grounded in legal and economic principles and are also accepted, in similar phrasing, in other legal systems. One example is the "Learned Hand" formula in Anglo-American legal systems. The Principles of European Tort Law and the Oslo Principles on Global Climate Obligations contain comparable assessment frameworks.'[33]

Indeed, the Principles of European Tort Law can serve as support for the chosen line of reasoning. The points of view the District Court used to define the duty of care of the State could have been inspired by art 4:101(1) PETL, according to which, the required standard of conduct depends in particular on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.[34]

In the *Urgenda* case, the Court of Appeals of The Hague upheld the District Court's decision, but based it directly on the right to life and family life, as enshrined

31 District Court The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7196 at 4.63.

32 District Court The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) at 4.54. For points of view the prime source is HR 5 November 1965, ECLI:NL:HR:1965:AB7079 (Kelderluik), while additional points are to found in HR 14 July 2017, ECLI:NL:HR:2017:1345, Nederlandse Jurisprudentie (NJ) 2017/467. They are summarised in English in the 'conclusion' (advice to the Supreme Court) of Procurator General FF Langemeijer and Advocate General MH Wissink in the *Urgenda* case, ECLI:NL:PHR:2019:1026 (*Urgenda*) at 2.22.

33 Procurator General FF Langemeijer and Advocate General MH Wissink, conclusion in the *Urgenda* case, ECLI:NL:PHR:2019:1026 (*Urgenda*) at 2.23.

34 *P Sutherland*, Obligations to Reduce Emissions: From the Oslo Principles to Enterprises (2017) 8 Journal of European Tort Law (JETL) 177, at 187.

in the European Convention on Human Rights. The Supreme Court upheld this decision. In the context of the partial responsibility of the State, whereas its breach of its duties gives rise to only part of the cause of the damage (global warming), the Supreme Court referred to the Principles of European Tort Law as well, arguing that partial responsibility is in line with several international and national liability law systems, including art 3:105 PETL.[35]

These two references to the PETL in the *Urgenda* case show that the Principles of European Tort Law have furthered the development of the duty of care of the government with regard to combatting climate change. The same could be said of the development of a similar duty for corporations. As a startling follow up to the *Urgenda* case, the District Court of The Hague ordered Royal Dutch Shell (Shell) to pursue a climate policy, pursuant to which, the CO2 emissions of the group – the Shell companies, their suppliers and customers – will be 45 % lower in 2030 than in 2019, upon the request of Milieudefensie, a Dutch non-governmental organisation which aims to further environmental interests. The District Court relied on the same legal framework as it did in the *Urgenda* case.[36] Thus, indirectly, the PETL contributed to this decision too.

Bénédict Winiger and the founding fathers of the PETL may not have been aware of this possibility at the time the Principles were drafted, but that is the quality of good law, soft or hard, ie that it leaves room for development when circumstances call for it.

B The *Milieudefensie v Shell* case

Let us take a closer look at *Milieudefensie v Shell* to see how the European framework was used to assess the central issue, ie whether the company had done enough and was planning to do enough to combat global warming or was in danger of acting in breach of its duty of care. In its search for a duty of care under art 6:162 of the Civil Code, the District Court of The Hague drew inspiration from the UNGP and the 2011 OECD Guidelines:

> 'In its interpretation of the unwritten standard of care, the court follows the UN Guiding Principles (UNGP). The UNGP constitute an authoritative and internationally endorsed "soft law" instrument, which set out the responsibilities of states and businesses in relation to human rights. The UNGP reflect current insights. They do not create any new right nor establish legally binding obligations. The UNGP are in line with the content of other, widely accepted soft

35 HR 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*) at 5.7.6.

36 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie*/*Shell*).

> law instruments, such as the UN Global Compact (UNGC) "principles" and the OECD Guidelines for Multinational Enterprises (the OECD guidelines). Since 2011, the European Commission has expected European businesses to meet their responsibilities to respect human rights, as formulated in the UNGP. For this reason, the UNGP are suitable as a guideline in the interpretation of the unwritten standard of care. Due to the universally endorsed content of the UNGP, it is irrelevant whether or not [Shell] has committed itself to the UNGP, although [Shell] states on its website to support the UNGP.'[37]

Inspired by the UNGP and the Guidelines 2011, the District Court of The Hague analysed what is expected of a company such as Shell because of the size of its organisation and because of the seriousness of the impact its activities can have on human rights, in terms of the scale, scope and irremediable nature of such activities. It should identify and assess all current and potential adverse human rights impacts that it could contribute to through its own activities, its business relationships or its end users. On this basis, a company must take appropriate measures, which will vary according to whether it 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 business relationships and the extent of its leverage in addressing the adverse impact.[38]

The District Court ruled that Shell also has the ability to influence its subsidiaries, business partners and end users. The far-reaching control of Royal Dutch Shell over the Shell group means that Shell's reduction obligation must be an obligation of result for emissions related to its own activities.[39] Shell's business relations are subject to 'a significant best-efforts obligation'.[40] The Court distinguished between, on the one hand, the emissions of Shell's suppliers, over which the company can exercise control and influence through its purchasing policy, and, on the other hand, those of its end users, over which it can exercise control and influence through the products it offers. With regard to end users, Shell is subject to contractual obligations and obligations from long-term concessions, which may limit its freedom of choice with regard to the supply, according to the Court, but taking into account those obligations, Shell is free to decide not to make new investments in exploration and fossil fuels and to change the nature and composition of the products it offers.[41]

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37 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie*/*Shell*) at 4.4.11.

38 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie*/*Shell*) at 4.4.16–21.

39 At 4.4.23.

40 At 4.4.24. Critically *J Spier*, Climate Litigation in a Changing World (2023) 231–233.

41 District Court The Hague 26 May 2021, at 4.4.25.

Finally, the District Court considered the proportionality of the reduction obligation. In this context, it considered relevant that (i) great danger is involved in the CO2 emissions for which Shell can be held responsible; (ii) the probability of damage for current and future Dutch residents is high, with serious risks to their human rights; and finally (iii) Shell can do something to turn the tide. The District Court concluded:

> 'This all justifies a reduction obligation concerning the policy formation by [Shell] for the entire, globally operating Shell group. The compelling common interest that is served by complying with the reduction obligation outweighs the negative consequences [Shell] might face due to the reduction obligation and also the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO2-generating activities. Due to the serious threats and risks to the human rights of Dutch residents and the inhabitants of the Wadden region, private companies such as [Shell] may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions to prevent dangerous climate change. [Shell] has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion. The court notes here that a "global" reduction obligation, which affects the policy of the entire Shell group, gives [Shell] much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units.'[42]

Based on all this, the District Court ordered Shell:

> 'Both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scop. 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.'

Thus, in the context of the duty of care and partly based on the UNGP and OECD Guidelines, the Court concluded that the oil company had to make greater efforts to reduce the level of greenhouse gas emissions.

In its judgment, the District Court took into account that with the current state of technology, fossil fuels cannot be dispensed with and that fossil fuels have a continuing role to play in meeting the global demand for energy during and after the energy transition, as well as the fact that the exact course of the energy transition required to reduce CO2 emissions cannot be predicted in advance in detail.[43] However, it did not leave room for a line of reasoning that the Supreme Court had followed previously, namely, that we are dealing with the downside of the success of

42 Ibid, at 4.4.54.

43 Ibid, at 4.4.31.

the post-war industrialisation policy and the resulting benefits for Dutch society. The consequences of greenhouse gas emissions are not to be dismissed as a general social risk, which should not be unilaterally passed on to industry or whose realisation should be prevented through government intervention alone.[44] The fact that Shell is permitted to operate by the government, that its products are socially accepted and that there are currently insufficient alternatives available for these products no longer justifies the negative consequences.

Shell argued that imposing the reduction obligation on it would lead to a distortion of competition and damage to the level playing field for the oil and gas market. The Court dismissed this argument, because the defence was not specified adequately.[45] Yet, the criticism that has since been expressed with regard to the Court's decision is precisely related to this point. Why should this particular company be held liable? Fairer climate measures can be put in place that do not depend on the city in which a company is located and in which judges are willing to address it critically and that do not place that company in a difficult, dependent position vis-à-vis its suppliers and customers.[46] The options from which the judge has to choose are perhaps better left to politicians.[47] For the same reasons, one could argue that the Principles of European Tort Law do not offer the appropriate framework for making such political choices.

All in all, the decisions of the District Court of The Hague show that the framework of art 4:102(1) PETL is appropriate for assessing the duty of care of companies with regard to reducing greenhouse gas emissions of the companies themselves and of their business partners.[48] This does not mean that an attempt should be made to enshrine this development in a new principle. That would not sit well with the abstract nature of the Principles. Moreover, it would be a snapshot in time. What is deemed necessary now to contain global warming may already be outdated next year. After all, since the conclusion of the Paris Agreement, it has been repeatedly shown that there is more global warming in the pipeline than we thought and that it is occurring sooner than we thought.

44 HR 30 September 1994, ECLI:NL:HR:1994:ZC1460, NJ 1996/196, note *CJH Brunner* (*State*/*Shell*).

45 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie*/*Shell*) at 4.4.53.

46 *J Spier*, SDGs: tussen droom en daad: een processie van Echternach (2021) 6 Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur (TvOB) 179 f.

47 *L Smeehuijzen*, De veroordeling van Shell tot 45 % CO2-reductie in 2030 (2022) 8 NJB 540–548 and *FB Bakels*, Rechtspraak en politiek (2022) 18 NJB 1459–1465.

48 Cf *Spier* (fn 40) 104, arguing that the 'reasonable person' yardstick is one of the most promising avenues.

IV Remedies: injunction vs compensation

The District Court of The Hague was able to grant the requested injunction due to the mere fact that Shell threatens to violate its duty of care in the future. Although the District Court considers it an established fact that Shell set more stringent climate ambitions for the Shell group in 2019 and 2020 than it did previously, the District Court also noted that the business plans in the Shell group still have to be updated in accordance with these climate ambitions, and that a further explanation of its future portfolio and plans is still pending:

> 'In the court's view, [Shell's] policy, policy intentions and ambitions for the Shell group largely amount to rather intangible, undefined and non-binding plans for the long-term (2050). These plans ("ambitions" and "intentions") are furthermore not unconditional but – as can be read in the disclaimer and cautionary notes to the Shell documents – dependent on the pace at which global society moves towards the climate goals of the Paris Agreement ("in step with society and its customers"). Emissions reduction targets for 2030 are lacking completely; the NCF identifies the year 2035 as an intermediate step (see under 2.5.19). From this the court deduces that [Shell] retains the right to let the Shell group undergo a less rapid energy transition if society were to move slower. Moreover, [Shell] has insufficiently contested the standpoint of Milieudefensie et al. that [Shell's] planned investments in new explorations are not compatible with the reduction target to be met. The Shell group's policy, as determined by [Shell], mainly shows that the Shell group monitors developments in society and lets states and other parties play a pioneering role. In doing so, [Shell] disregards its individual responsibility, which requires [Shell] to actively effectuate its reduction obligation through the Shell group's corporate policy.'[49]

The order, issued by the District Court of The Hague, leaves Shell room to develop its own reduction path for the Shell group. The company is free to decide to what extent it will forgo new investments in exploration and fossil fuels and how it will change the nature and composition of the products it offers, as long as this provides for the reduction of the Shell group's CO2 emissions (Scop. 1 to 3) in 2030 with a net 45 % compared to 2019. With respect to its business relations, Shell may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as far as possible. As a consequence, Shell may forgo new investments in the extraction of fossil fuels. It also may limit its production of fossil resources.[50]

The District Court notes explicitly that this does not imply that it could have honoured a claim for compensation at this time:

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49 District Court The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie*/*Shell*) at 4.5.2.
50 Ibid, at 4.4.39.

> 'The above-established imminent violation of the reduction obligation – pertaining to the policy for end 2030, which [Shell] is yet to specify – does not imply that the Shell group's CO2 emissions are currently unlawful. There is also no ground for that opinion. This is all the more applicable because Milieudefensie et al. take 2019 as the base year while its arguments relate to the policy for 2030. Therefore, the first part of claim 1(a) must be rejected.'[51]

The latter consideration raises the question of when exactly the established standard applies: now or later, and whether the standard is subject to change over time. The duty of care aimed at combatting global warming can be established in various ways, aimed at the present, the past and the future. The legal consequences to be attached to it – on which the standard is based and the appropriate remedies in the event of a violation – can differ, depending on how a specific procedure is structured. In the case of *Milieudefensie*/*Shell*, the focus of the procedure is on the situation in 2030, which is assessed by today's standards. In 2030, the company must have achieved certain results or must have made certain efforts. Before that, there will be an appraisal as to whether the company's policy is aimed at the goals to be set and whether it is on track to achieve those goals. That appraisal determines whether there is a threatened tort, no more than that. It is obvious that certain best efforts obligations that are part of the standard of due care will become more concrete before 2030 and will therefore be separately enforceable. Any violation of this will result in an unlawful act, but this was not at issue in *Milieudefensie*/*Shell*.

Injunctive relief is not provided for in the Principles of European Tort Law, due to their focus on compensation and due to different views on two other topics. First, it is debated whether a right to compensation implies that a legal obligation has been breached, a legal obligation whose fulfilment can be claimed.[52] Second, an injunction would imply that tort law has and should have a preventive function. Both topics have been discussed on the occasion of Bénédict Winiger's farewell.[53] For this reason, I would like to focus on another aspect of injunctive relief, that is the question whether injunctive relief should be available in cases where human rights are involved.

The ECHR provides that everyone whose rights and freedoms set out in the European Convention on Human Rights have been violated must have an effective remedy before a national authority. Therefore, in cases where there is an arguable complaint of the violation of these rights and freedoms, national law must provide a

51 Ibid, at 4.5.8.

52 Let alone the possibility that preventive injunctions are precluded by national law; see eg *M Spitzer*/*B Burtscher*, Liability for Climate Change: Cases, Challenges and Concepts (2017) 8 JETL 174 f.

53 See *J Knetsch*, Should Wrongfulness be Required or is Fault Enough? Arts 1:101, 4:101 ff PETL (2023) 14 JETL 73; *T Kadner Graziano*, The Purposes of Tort Law: Article 10:101 of the Principles of European Tort Law Reconsidered (2023) 14 JETL 23.

remedy leading to the obtaining of proper redress. This remedy must be effective in practice as well as in law. The scope of the obligation under art 13 ECHR depends on the nature of the aggrieved person's complaint under the ECHR. The European Court of Human Rights (ECtHR) argues, in the context of a violation of art 3 ECHR, the prohibition of torture:

> 'With respect to complaints under Article 3 of inhuman or degrading conditions of detention, two types of relief are possible: improvement in these conditions and compensation for any damage sustained as a result of them. Therefore, for a person held in such conditions, a remedy capable of rapidly bringing the ongoing violation to an end is of the greatest value and, indeed, indispensable in view of the special importance attached to the right under Article 3. However, once the impugned situation has come to an end because this person has been released or placed in conditions that meet the requirements of Article 3, he or she should have an enforceable right to compensation for any breach that has already taken place. In other words, in this domain preventive and compensatory remedies have to be complementary to be considered effective.'[54]

In the context of family life and fair trial, the European Court of Human Rights found:

> 'However, in proceedings in which the length of the proceedings has a clear impact on the applicant's family life (and which thus fall to be examined under Article 8 of the Convention) the Court has considered that a more rigid approach is called for, which obliges the States to put into place a remedy which is at the same time preventive and compensatory .... The Court has observed in this respect that the State's positive obligation to take appropriate measures to ensure the applicant's right to respect for family life risked becoming illusory if the interested parties only had at their disposal a compensatory remedy, which could only lead to an a posteriori award for monetary compensation.'[55]

A remedy is thus considered effective for the purposes of art 13 ECHR if it will prevent or end the violation or if the remedy provides adequate redress for a violation that has already occurred. In the case of more serious violations, the available remedies must provide for both prevention or cessation of the violation and remedy.[56]

Given the obligation to provide for an effective remedy that should take the form of a preventive measure when the circumstances – including the human right invoked – call for it, consideration should be given to expanding the scope of the PETL and providing for injunctive relief in addition to compensation. To some extent, this would fit with the various indications in the PETL that tort law has a pre-

54 ECtHR *Neshov and Others v Bulgaria*, 27.1.2015, no 36925/10, at 181.

55 ECtHR *Kuppinger v Germany*, 15.1.2015, no 62198/11, at 137.

56 ECtHR *Kuppinger*, 15.1.2015, no 62198/11, at 137 *and JJ van der Helm*, Het rechterlijk bevel en verbod als remedie (2023) nos 128–162.

ventive function.[57] This would be perfectly in line with the debate on climate change responsibility, as it has become clear that first and foremost greenhouse gas emissions need to be reduced. Claiming damages will not result in that goal being achieved sooner. As emphasised by the drafters of the Oslo Principles on Climate Obligations of Enterprises:

> 'The Oslo Principles, the [Principles on Climate Obligations of Enterprises] and this update have in common that they prioritize prevention. Avoiding global catastrophe is of utmost importance, even more than compensating victims. We are not at all suggesting that victims do not matter. Precisely because they do matter, it would be a serious mistake to throw in the towel by giving up the fight against climate change. The toll of unabated climate change will be so unbearably high in human, environmental and economic terms that compensation of all or even most losses is a phantom. Hence, even if one would be willing to prioritize damages – an extremely unattractive view – it simply will not work.'[58]

Consideration could be given to supplementing the Principles on this point. What applies to global warming may also apply to other risks that may threaten society, for which it is more important to prevent them than to compensate afterwards. Including prohibitions in the Principles would therefore not need to detract from their somewhat abstract nature.

V Takeaways for the Principles of European Tort Law

Climate change is undeniably a European concern. At the level of governments, gathered in the context of the United Nations, the OECD and the EU Council, and at the level of the European Commission, it is clear that companies are expected to ensure that they and their business partners reduce greenhouse gas emissions as soon as possible. Increasingly, this takes the form of either a legal obligation to contribute to reducing greenhouse gas emissions, or recognition of liability where insufficient action has been taken.

The framework of art 4:102(1) PETL seems to be appropriate for assessing the duty of care of companies with regard to reducing greenhouse gas emissions of the

57 *P Gillaerts*, Extracontractual Liability Law as a Policy Instrument: Public Law in Disguise or in Chains? A Fundamental View on the Use and Usefulness of Extracontractual Liability Law for Public Goals from Belgian and Dutch Law (2020) 11 JETL 16, 17ff.

58 *Expert Group on Climate Obligations of Enterprises*, Principles on Climate Obligations of Enterprises (2020) 46f.

companies themselves and of their business partners. This does not mean that an attempt should be made to enshrine this development in a new principle. That would not sit well with the abstract nature of the Principles. Moreover, it would be a snapshot in time. What is deemed necessary now to contain global warming may already be outdated next year. After all, since the conclusion of the Paris Agreement, it has repeatedly been shown that there is more global warming in the pipeline than we thought and that it is coming sooner than we thought.

A more abstract approach could be to establish that, in the context of human rights violations, the duty of care can be determined partly on the basis of internationally recognised fundamental rights and international documents that entail a call of duty for companies. One might think of art 4:102(3) PETL, providing that rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct. It could be added that the same applies to rules that seek to ensure that companies' conduct is partly determined by internationally recognised fundamental rights.

Once a duty of care is established, making room in the PETL for injunction relief – defined *in abstracto* – would go a long way. Although the inclusion of an injunction in the PETL may detract from the PETL's concentration on compensation, it would do justice to the need to provide preventive measures, for those cases – like climate change cases – where human rights are at stake and ex post compensation is not sufficient under art 13 ECHR.