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Climate Litigation in Indonesia: Lessons from the *Royal Dutch Shell* Case

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Abstract
This article compares the concept of unlawful act in the Indonesian and Dutch Civil Codes, with specific attention to the notorious decision of the Milieudefensie et al v. Royal Dutch Shell Case. Therein, the Dutch Court applied unwritten law under Article 6:612 of the Dutch Civil Code, calling for reduction in carbon emissions through policy changes by the Shell group. The use of unwritten law allowed for a comprehensive assessment of legal bases, including international soft law instruments, such as the United Nations Guiding Principles on Business and Human Rights. Inspired by such a decision, this article aims to unveil the readiness of Article 1365 of the Indonesian Civil Code in entertaining a similar case. It compares the approach taken in the Milieudefensie et al. v. Royal Dutch Shell Case with pertinent decisions by the Indonesian court concerning the implementation of Article 1365 of the Indonesian Civil Code. Furthermore, it focuses on two prongs of civil liability that are necessary for establishment: 1) unwritten law; and 2) causality. By doing so, this article aims to contribute to the evolving realm of climate litigation, specifically within the framework of civil law.

Introduction

Climate change is a concern highly prioritized by the international community. The shared interest by the international community in addressing climate change led to the successful conclusion of the Paris Agreement in 2015. States have also openly expressed their commitment in achieving Sustainable Development Goal 13: Climate Action by 2030. In this regard, Indonesia signed the Paris Agreement in 2016, expressing its commitment to maintain a global average temperature increase to 'well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.[1] Nonetheless, fulfilling such a commitment remains challenging. Signs of climate change are prominent in the archipelagic State, some facilitated by the continuous high carbon emitting activities from companies in the energy sector.[2] Considering the dire

[1] PPID, 'Indonesia Signs Paris Agreement on Climate Change' (*Ministry of Environment and Forestry*, 2016) <http://ppid.menlhk.go.id/siaran_pers/browse/299> accessed 20 September 2023.

[2] Uliyasi Simanjuntak, 'Menyongsong Naiknya Emisi Pasca Pandemi, Aksi Iklim Indonesia Dinilai Sangat Tidak Memadai' (*Institute for Essential Services Reform*, 2021) <https://iesr.or.id/menyongsong-naiknya-emisi-pasca-pandemi-aksi-iklim-indonesia-dinilai-sangat-tidak-memadai> accessed 20 September 2023.

consequences that will arise in the long-term as a result of the persisting emission of carbon, action to tackle activities contributing to climate change is greatly needed.

One of the ways to effectively control and mitigate such consequences is to call for responsibility from actors contributing to climate change through legal recourse. Climate activists as well as impacted individuals are now resorting to civil litigation, also known as climate litigation. In 2020, the United Nations Environmental Programme reported that the number of climate litigation cases nearly doubled since 2017, with 1,550 climate change cases filed in 39 countries including courts of the European Union.[3]

Furthermore, there has been a surge in lawsuits filed to impose liability on companies. In 2017, claims were made against the RWE AG, a German multinational energy company, by a Peruvian farmer and assisted by NGO Germanwatch in the District Court of Essen. The melting of glaciers in the area and the increasing risk of a devastating flood that would impact around 50,000 people encouraged a lawsuit against RWE AG. Moreover, Indonesia is currently witnessing a climate litigation in the *Asmania et al. v. Holcim* case, filed against Holcim Ltd. in the Swiss District Court by four islanders of Pari Island seeking compensation from the Swiss cement giant over its carbon dioxide emissions which allegedly damaged and increased flooding in the Pari Island.[4]

Despite being an effective tool in addressing climate crisis, climate litigation toward private entities has proven to be complicated as it may be difficult to establish the causation between the actions of the company and the impacts suffered, especially in the case where the plaintiffs claim that the effects of the defendant have contributed to climate change globally. Its nexus may be too far, considering that climate change itself occurs due to contributions from many actors and business activities emitting carbon. This is demonstrated in the *Saul Luciano Lliuya v. RWE* case, wherein RWE had not established any coal power plants in Peru or the rest of South America.[5]

[3] United Nations Environment Programme, 'Global Climate Litigation Report: 2020 Status Review' (2020) 13 <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review#:~:text=The UNEP Global Climate Litigation,has occurred around the world>.

[4] DW, 'Empat Warga Pulau Pari Gugat Raksasa Semen Eropa' (*DW.com*, 2023) <https://www.dw.com/id/empat-warga-pulau-pari-gugat-raksasa-semen-eropa/a-64628743> accessed 25 February 2023.

[5] Eva-Maria Braje, 'Is Civil Litigation a Proper Tool to Stop Climate Change?' (*Ince*, 2021) <https://www.incegd.com/index.php/en/news-insights/energy-infrastructure-civil-litigation-proper-tool-stop-climate-change> accessed 20 February 2023.

In civil law countries, climate change litigations have been filed against companies based on an unlawful act. Generally, unlawful acts are regulated under private law which aims to *first*, provide compensation to victims who suffered losses due to an injury and *second*, to redress a wrongful conduct that happened in the past while concurrently deterring and minimizing such a conduct from happening again.[6] Establishing an unlawful act in climate litigation is evident in the Netherlands in the *Milieudefensie et. al* v. RDS case and most recently, in France in the *Notre Affaire à Tous v. Total* case. Establishing causation is indispensable as it is required to identify who will be deemed liable for the damages incurred.[7] Hence, in the context of climate litigations, the effects of climate change must, at least to a certain extent, be a consequence of the actions of the company.[8]

Although difficult, causality between a company's activities and its contributions to climate change has been successfully established in the *Milieudefensie et. al* v. RDS case[9] (hereinafter referred to as '**Shell Case'**). The Plaintiffs therein filed the claim based on unlawful act under Article 6:162 of the Dutch Civil Code. By relying on the obligation of due care, the Hague District Court recognized Shell's individual partial responsibility to 'contribute to the fight against dangerous climate change according to its ability'.[10] As a result, the Court favored the petitions submitted by the Plaintiffs as it decided that the RDS possesses the obligation to reduce CO2 emissions by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy, which applies to the entirety of its energy portfolio and all scopes of emissions.[11]

In light of the recent developments, this paper will explore whether Article 1365 of the Indonesian Civil Code can be implemented to invoke responsibility to businesses

[6] Carlo Vittorio Giabardo, 'Climate Change Litigation and Tort Law: Regulation Through Litigation?' [2020] SSRN Electronic Journal 9 <https://www.ssrn.com/abstract=3858956>.

[7] Roda Verheyen and Johannes Franke, 'Climate Change Litigation: A Reference Area for Liability' in Peter Gailhofer et al. (ed), *Corporate Liability for Transboundary Environmental Harm* (Springer 2023) 377.

[8] ibid.

[9] *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court The Hague, Judgment of 26 May 2021, English translation at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2021:5339> hereinafter referred to as "Shell Case" (accessed 5 January 2023).

[10] Shell Case para. 4.4.52.

[11] Shell Case paras. 4.4.54, 5.3.

whose activities are significantly contributing to climate change. This will be done by comparing Article 1365 of the Indonesian Civil Code with Article 6:162 the Dutch Civil Code and analyzing the approach utilized in the Shell Case. Moreover, it will examine two fundamental points of civil liability, namely 1) unwritten law; and 2) causality.

Research Method

This research is a normative legal research. It utilizes three main approaches, namely statutory, comparative, and conceptual approaches. By equipping the statutory approach, this research assesses both the Dutch and Indonesian Civil Code to dissect the concept of 'unlawful act'. Concurrently, it implements the comparative approach as it contrasts the two together to further comprehend the applicability of the notion of unlawful act in climate litigations. Ultimately, the use of a conceptual approach is reflected in this research's evaluation of core legal concepts, specifically with regard to unwritten law, standard of care, and causality.

Indonesian Climate Litigations Based on Article 1365 of the Indonesian Civil Code

Climate ligations in Indonesia are unique as they underscore climate change as a secondary tort and place climate change as a peripheral issue, reflecting the adoption of the Second Wave of Climate Litigation Theory.[12] For instance, in the *Komari et al. v. Mayor of Samarinda et al.* case, the main submission of the Plaintiffs focused on the issuance of permits that were not in accordance with the existing procedure and the failure of the government to reclaim post-mining.[13] Nevertheless, these litigations face similar issues as other climate litigations, particularly with regard to causation that is difficult to establish.[14]

Article 1365 of the Indonesian Civil Code has been used numerously against corporations, particularly to address compensation and their responsibility for

[12] Zefanya Albrena Sembiring and Audi Gusti Baihaqie, 'Litigasi Perubahan Iklim Privat Di Indonesia: Prospek Dan Permasalahannya' (2020) 7 Jurnal Hukum Lingkungan Indonesia 134 <https://jhli.icel.or.id/index.php/jhli/article/view/215>.

[13] ibid.

[14] Andri G Wibisana and Conrado M Cornelius, 'Climate Change Litigation in Indonesia' in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020) 234.

environmental damages and greenhouse gas emissions. Most climate litigations have so far been filed against the government. Concurrently, however, the Indonesian government has also progressively transitioned to filing against corporations by depending on Article 1365 of the Indonesian Civil Code. The LSE Grantham Research Institute on Climate Change and the Environment notes 12 climate change-related cases in Indonesia, most of them filed by the Ministry of Environment. Two are of the following:

1. *Ministry of Environment v. PT. Kalista Alam (Court Decision No. 12/Pdt.G/2012/PN.MBO):* The Ministry of Environment filed a lawsuit against the corporation PT. Kalista Alam for damages that it caused because of its land clearing activity, comprising draining and burning peatland which consequently caused fires in the areas and released 13,500 tC into the atmosphere. Moreover, the damages had prevented the peatland from absorbing CO2. Along with Article 1365 of the Indonesian Civil Code, the lawsuit was also based on Article 88 of Law No. 32 of 2009 on Environmental Protection and Management Act which imposes strict liability, imposing parties to be responsible for losses incurred without previously proving the fault. The main issue surrounded the corporation's failure to provide prevention tools to avoid the fires and to fulfil its obligation under the forestry regulations to develop fires control measures, hence entailing significant environmental damages. A total of IDR 425.3 million was asked to compensate for the losses. The District Court asserted that there was a violation of the relevant regulations and as a such, PT. Kalista Alam was responsible for the environmental losses. The ruling was ultimately upheld by the Supreme Court.
2. *Ministry of Environment and Forestry v. PT. Asia Palem Lestari (Court Decision No. 607/Pdt.G-LH/2019/PN.Jkt.Utr)*: A lawsuit based on Article 1365 of the Indonesian Civil Code was filed against PT. Asia Palem Lestari for burning the peatland to implement a palm oil plantation. The main argument submitted by the Ministry of Environment and Forestry was that PT. Asia Palem Lestari did not fulfil its obligation in providing fire-preventive facilities that met the requirements under Articles 12, 13 and 14 Indonesian Governmental Regulation No. 4 of 2021, hence causing ecological and economic damages, such as the release of 2700 tC and loss of function of carbon

sinks equivalent to 945 tC. Article 1365 of the Indonesian Civil Code was used to support the Ministry of Environment and Forestry's submission with respect to compensation, which it requested for costs amounting to IDR 328.050.000. The lawsuit was, however, dismissed by the District Court of North Jakarta based on *plurium litis consortium*, requiring others who own the area to be included in the lawsuit.

Climate Litigations Pursuant to the Dutch and Indonesian Civil Code

The concept of unlawful act under the Dutch Civil Code is regulated in Article 6:162, which stipulates as follows:

1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
2. A tortious act is regarded as a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behavior.
3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (general opinion).

For an unlawful act to be attributed, four elements must be satisfied, namely that there is an act or omission, unlawfulness, imputability, and that the damages were a result of the act (causality).[15] Wrongfulness of a particular action is divided into three main categories: first, the infringement of an absolute right; second, a breach of statutory duty; or third, when an act contravenes a standard of conduct upheld in society.[16] Regarding the last point, an unlawful act can be a result of a violation against an unwritten law that is regarded as a proper social conduct as long as there was no justification for such

[15] Thijs Beumers and Willem van Boom, 'Tortious and Contractual Liability from a Dutch Perspective' in Ernst Karner (ed), *Tortious and Contractual Liability – Chinese and European Perspectives* (Jan Sramek Verlag 2021) 226.

[16] ibid.

an act. These unwritten standards should already exist at the time the conduct was complained about.[17] The category of unwritten law is seen as a residual as it acts as a fallback option that can be depended on by the injured parties if they cannot base their claims on the first two categories.[18] As the unwritten law purports to the principle of care and protection, its scope covers third parties that hold obvious and foreseeable interests that suffer damages due to one's negligence.

While the assessment of the standards of the first two categories is clear, the application of unwritten law may be tricky, and its standards require further interpretation. The applicability of unwritten law is inseparable from the *Lindenbaum v. Cohen* judgment of the Dutch Supreme Court, which affirms that unlawful act under the Dutch Civil Code shall not only be limited to a violation of a statutory rule, but shall further encompass any contradictions '..to good morals or to the carefulness which is due in society with regard to another's person or property'.[19] Another significant decision concerning unwritten law is also viewed in the *Kelderluik* judgment, which proposes that parties possess the duty to consider and potentially act on behalf of the interest of others.[20]

With respect to imputability, the Dutch law acknowledges three alternatives. First, fault – when the act can be blamed on the tortfeasor. Second, when the act is attributable to the tortfeasor by law, irrespective of the fact that he is indeed at fault. Lastly, imputability remains applicable when it is demanded by 'societal opinions' (*verkeersopvattingen*), which include unwritten source of legal and moral opinion.[21]

On the other hand, unlawful acts are essentially governed under Article 1365 of the Indonesian Civil Code which stipulates that 'a party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore'. Elements of Article 1365 of the Indonesian Civil Code that shall be cumulatively fulfilled are of the following:

[17] Ivo Giesen, Elbert de Jong and Marlou Overheul, 'How Dutch Tort Law Responds to Risks', *Regulating Risk through Private Law* (Intersentia) 169.
[18] ibid.
[19] ibid 166.
[20] ibid 176.
[21] Beumers and Boom (n 15) 228.

1. There exists an act or omission;
2. Such an act is unlawful;
3. The existence of such an act derives from fault;
4. The existence of damages/loss;
5. Causality between the act and the damages.

In defining the standard of unlawful act, the Indonesian Civil Code adopts an approach similar to the Dutch Civil Code as it extends to cover unwritten law.[22] Such an extension reflects the adoption of the *Hoge Raad*'s decision in the *Lindenbaum v. Cohen* Decision of 31 January, 1919.[23] In sum, the Indonesian Civil Code acknowledges that unlawful acts may arise when the conduct contravenes:

a. Written law, namely 1) legal obligation; or 2) another's subject's rights; or
b. Unwritten law, namely 3) decency; or 4) propriety, care, and prudence that should be applied by an individual in the society or against a property.[24]

Although most lawsuits are made to establish a violation against written law, some jurisprudence, such as the *Musudiati v. I Gusti Lanang Rejeg* case (Decision No. 073/PN. MTR/PDT/1983), have applied the assessment of unwritten law to assert the existence of an unlawful act. Therein, both principles of decency and propriety were referred to decide that the failure to fulfil a promise to marry constitutes an unlawful act. The Court considered that the Defendant's action of living with the Plaintiff for one year despite not being married yet and failing to keep his promise was deemed unacceptable by the Indonesian society. It asserted that such an act had not only contravened the Plaintiff's subjective rights, namely her dignity and reputation, but further contradicted decency as moral norms and was against propriety upheld by the society. Such an evaluation was eventually affirmed by the Indonesian Supreme Court in Decision No. 3191 K/Pdt/1984.

Summary of the Shell Case

On April 5, 2019**,** the Dutch environmental associations, namely Mileudefensie,

[22] Luqman Hakim, 'Penegakan Hukum Lingkungan Hidup Melalui Gugatan Perbuatan Melawan Hukum' (2021) 2 Jurnal Hukum Lex Generalis 1264, 1272 <https://ojs.rewangrencang.com/index.php/JHLG/article/view/149>.

[23] 'Brief Review of 2019' (*Hoge Raad Der Nederlanden Jaarverslag 2019*, 2019) <https://2019.jaarverslaghogeraad.nl/2019-highlighted/brief-review-of-2019> accessed 26 February 2023.

[24] Hakim (n 22).

Greenpeace Netherland, *Waddenvereniging,* Both Ends, Jongeren Milieu Actief, and Action Aid (hereinafter jointly referred to as '**Milieudefensie et al.'**), filed a class action lawsuit against Royal Dutch Shell PLC (hereinafter, '**RDS'**). Both the Netherlands and the Wadden Region had been witnessing an increase in temperature about twice as fast as the global average. Dutch residents inhabiting the Wadden Region for instance, raised concerns regarding health risks and deaths due to climate change-induced hot spells and the increased mortality risk caused by infectious diseases, deterioration of air quality, increase of UV exposure, and many more.[25]

Milieudefensie et al. represents 17,379 individual Plaintiffs submitting claims against the RDS to oblige it to reduce its emission deriving from its business operations and sold energy-carrying products in accordance with the provisions and objective of the Paris Agreement through its corporate policy. The RDS, on the other hand, constitutes a parent company and the top holding of the Shell group which, consequently, has the authority to formulate general policies such as investment guidelines to promote energy transition as well as business principles for Shell companies. This is evidenced by RDS' establishment of short-term targets reflected in its 2019 Annual Report, which considered energy transition as a performance indicator which counts towards 10% in weighting, while the other 90% encompasses financial performance indicators.

In encouraging energy transition, the RDS divided activities into Scope 1, 2, and 3 by following the World Resources Institute Greenhouse Gas Protocol. The division of these scopes depends on the types of emissions, with Scope 1 mainly encompassing direct emissions deriving from sources that are 'owned or controlled in full or in part by the organization'.[26] On the other hand, Scope 2 and 3 cover indirect emissions and are mainly distinguished by the source of emissions. Scope 2 covers indirect emissions from 'third-party sources from which the organization has purchased or acquired electricity, steam or heating for its operations' while the latter covers those that emit from the activities of the organization but occur from 'greenhouse gasses sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the

[25] Shell Case para. 4.4.6.
[26] ibid., para. 2.5.4.

use of third-party purchased crude oil and gas'.[27]

RDS filed a motion for inadmissibility, challenging the Court's ability and discretion to adjudicate the case. It submitted that the claims made by the Plaintiffs would require the Court to exceed its lawmaking functions. Furthermore, it described the Plaintiff's claims as far-reaching, noting that the claims reflected issues of national and international policy which it claims to be matters reserved for the Dutch political and democratic institutions, in which a national civil court is not a proper forum to assess such concerns. It continued that the Plaintiffs are requesting the Court to determine how CO2 may be emitted at particular points in time by filling the alleged gap in national and international law.[28] According to the RDS, such an action shall only be under the discretion of the political institutions, particularly of the legislative branch.[29] The Court rejected such claims and asserted that assessing whether or not RDS possesses the alleged legal obligation that is expected in the claims made by the Plaintiffs indeed constitutes a task of the Court.[30] In doing so, the Court refers to the existing unwritten standard of care under Article 6:162 of the Dutch Civil Code.[31]

Key Highlights of the Shell Judgment – Unwritten Law (Standard of Care) and Causality

The scope of unwritten standard under Article 6:162 of the Dutch Civil Code assessed in the Shell Case was of 14-fold:

> 1) the policy-setting position of RDS in the Shell group; 2) the Shell group's CO2 emissions; 3) the consequences of the CO2 emissions for the Netherlands and the Wadden region; 4) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region; 5) the UN Guiding Principles; 6) RDS' check and influence of the CO2 emissions of the Shell group and its business relations; 7) what is needed to prevent dangerous climate change; 8) possible reduction pathways; 9) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand; 10) the ETS

[27] ibid.

[28] Royal Dutch Shell PLC, Statement of Defence <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20191113_8918_reply.pdf>, para 402.

[29] ibid., para. 407.

[30] Shell Case, para 4.1.3.

[31] ibid.

system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group; 11) the effectiveness of the reduction obligation; 12) the responsibility of states and society; 13) the onerousness for RDS and the Shell group to meet the reduction obligation; 14) the proportionality of RDS' reduction obligation.[32]

In the Netherlands, the unwritten standard of care extends to laws and regulations including international treaties not binding towards a company.[33] Consequently, the existence of 'due care' may entail liability towards entities or individuals even though their actions do not violate specific provisions and regulations under Dutch and international law.[34] This derives from the indirect effect doctrine,[35] which does not require for the international instrument to bind to all parties and to entail legal effect in the relations between the two parties for it to be implemented in the proceeding.[36]

When examining due care in the Shell Case, the Court signified the role and interest of human rights and values and relied on non-binding international instruments. These were essentially embodied in the Court's interpretation of the unwritten standard of care with respect to the case at hand. This was probable as the Court viewed that human rights and values are universal in nature. In emphasizing the human rights approach, the Plaintiffs had subjected RDS to the provisions in the European Convention on Human Rights (hereinafter, '**ECHR'**) and in the International Convention on Civil and Political Rights (hereinafter, '**ICCPR'**) as similarly applied by the Plaintiffs in the *Urgenda* case. The Court in the Shell Case underscored that the provisions within those Conventions only apply in relationships between States and citizens.[37] This, however, did not imply that human rights cannot be used at all in approaching the standard of care in cases

[32] ibid., para. 4.4.2.

[33] Otto Spijkers, 'The Influence of Climate Litigation on Managing Climate Change Risks: The Pioneering Work of the Netherlands Courts' (2022) 18 Utrecht Law Review 2, 139 <https://www.utrechtlawreview.org/articles/10.36633/ulr.801/>.

[34] Otto Spijkers, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell' (2021) 5 Chinese Journal of Environmental Law, 237 <https://brill.com/view/journals/cjel/5/2/article-p237_7.xml>.

[35] Chiara Macchi and Josephine van Zeben, 'Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et Al . v Royal Dutch Shell' (2021) 30 Review of European, Comparative & International Environmental Law, 412 <https://onlinelibrary.wiley.com/doi/10.1111/reel.12416>.

[36] Nicola MCP Jagers and Marie-Jose van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands' (2008) 33 SYMPOSIUM: Corporate Liability for Grave Breaches of International Law 855–856 <https://brooklynworks.brooklaw.edu/bjil/vol33/iss3/2>.

[37] Shell Case, para. 4.4.9.

involving corporations, as human rights embody the fundamental interests and value for the society as a whole and thus, can be used *in casu*.

After proceeding to acknowledge the use of human rights to interpret the standard of care, the Court subsequently referred to soft laws, primarily the United Nations Guiding Principles on Business and Human Rights (hereinafter, '**UNGPs'**). In doing so, the Court emphasized that the UNGPs constitute 'a global standard of expected conduct for all business enterprises wherever they operate'.[38] Furthermore, it highlights that such principles stand independently of States' abilities to satisfy their human rights obligations and does not interfere with them.[39] The District Court views that the UNGPs are also in line with other soft law instruments that are widely accepted, namely the UN Global Compact and the OECD Guidelines for Multinational Enterprises.[40]

The UNGPs is 'universally endorsed' and emphasizes human rights obligations including those enshrined in the ICCPR and other internationally recognized human rights instruments such as the ECHR.[41] It essentially contains three pillars, enforcing the principles of 'Protect, Respect, and Remedy'. The second pillar in particular, emphasizes businesses' responsibility to respect human rights through due diligence to prevent, mitigate, or address adverse impacts entailing from their operations. Consequently, regardless of where they operate, businesses are expected to deal with the risk of involvement in human rights abuses as a matter of legal compliance.[42] In the case of RDS, the corporation expressed its support of the UNGPs. This was recognized by the Court, although it further highlighted that regardless of RDS' recognition, the universal nature of the UNGPs would nonetheless underscore RDS' obligations to respect the rights enshrined in the relevant Conventions.[43] With such an approach, the Court was therefore able to signify Shell's obligation to respect and avoid the infringement of human rights

[38] ibid., para 4.4.13.
[39] ibid.
[40] ibid., para. 4.4.11.
[41] ibid., para 4.4.14.
[42] John Sherman, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' in Rae Lindsay and Roger Martella (eds), *Corporate Responsibility, Sustainable Business: Environmental, Social, and Governance Frameworks for the 21st Century* (Kluwer Law International 2020).
[43] ibid., para. 4.4.11.

when conducting its business. Requiring Shell to conform to these principles, mandate it to act on adverse human rights impacts.

In addition, the District Court considered the evidence demonstrating that the RDS had been aware for a long time of the dangerous consequences of the emission of CO2 and the risks of climate change.[44] Knowing these consequences, the RDS is expected to take appropriate actions. The Court further highlighted that such an obligation constitutes an obligation of result, signifying RDS' need to remain active in removing or preventing serious risks entailing from the CO2 emissions that derive from its activities and to at best, maximize its influence to limit any lasting consequences.[45] On such a basis therefore, Shell shall take efforts in preventing, limiting, and where necessary, address the adverse impacts. Subsequently, the Court provides the discretion to the RDS to design its reduction obligation while considering its current obligations and develop its own corporate policy to fit it.[46] In short, as long as the RDS has the control and influence on the emissions of the Shell group, it has the individual partial responsibility to combat climate change.

In terms of causality, the fair share approach is utilized. The same approach was previously applied by the Dutch Supreme Court in the *Urgenda* judgment. Therein, claims were submitted by Urgenda against the government of the Netherlands, asserting that the latter was not doing enough to prevent dangerous climate change.[47] The Dutch Supreme Court used the fair share approach to address the responsibility in managing and mitigating climate change.[48] Such an approach highlighted that the State of the Netherlands cannot evade its partial responsibility in managing climate change risk.[49]

Similarly, in establishing the causal link between the activities of the RDS and climate change, the Hague District Court asserted that although the RDS cannot be fully held liable for failing to prevent climate change, such a defense does not ultimately erase

[44] ibid., para. 4.4.20.
[45] ibid., para. 4.4.55.
[46] ibid., paras. 4.4.54-4.455.
[47] ECLI:NL:HR:2019:2007, para. 2.2.1.
[48] ibid., para. 6.3.
[49] ibid., para. 5.7.7.

its duty to fulfil its obligation to reduce emission of greenhouse gasses. The fact that each emission reduction imprints some margin in the global carbon budget was significantly emphasized.[50] As a result, the Hague District Court contended that Shell should have taken sufficient effective measures as it was aware of the great risks it had imposed due to its activities and that ultimately its emission of greenhouse gasses played a substantial part in causing climate change.[51] In addressing RDS' responsibility, the Hague District Court further put an emphasis that RDS remains to bear individual responsibility despite it not being a sole contributor to climate change in the Netherlands and the Wadden Region. Consequently, such an obligation shall be detailed in its corporate policy for the Shell group.[52]

Although the fair share approach was used in the *Urgenda* case and Shell Case and has been increasingly used in cases before the European Court of Human Rights,[53] its definition was never thoroughly addressed. With the fair share approach, the Supreme Court in the *Urgenda* Case and followed by the Hague District Court in the Shell Case, underscored that the concerned parties cannot hide behind the reason that its own emissions are limited compared to the rest of the world and its actions to reduce its emissions would have no or very little impacts globally.[54]

Establishing causality in the Shell Case was much possible as the claims were not concerned in seeking compensation over losses that have occurred or arose, but rather focused in addressing physical climate change damage that are to be prevented (actions for injunctive relief).[55] The Plaintiffs in the Shell Case mainly urged the RDS to reduce its emissions volume, both directly and through its companies or legal entities under it and shall be in pursuant with the global temperature target envisaged in Article 2 paragraph (1) of the Paris Agreement and also with the related best available UN climate science.

[50] Shell Case, para 4.3.5.

[51] Spijkers (n 33) 140.

[52] Shell Case para. 4.4.52

[53] Lavanya Rajamani and others, 'National "Fair Shares" in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law' (2021) 21 Climate Policy 8, 984 <https://www.tandfonline.com/doi/full/10.1080/14693062.2021.1970504>.

[54] Chris Backes and Gerrit van der Veen, 'Urgenda: The Final Judgment of the Dutch Supreme Court' (2020) 17 Journal For European Environmental & Planning Law 398.

[55] Verheyen and Franke (n 7) 398.

Moreover, it primarily questioned the obligation of the RDS to exercise its influence and take necessary actions to remove or prevent serious risks that may entail due to the amount of CO2 emitted and any lasting consequences from its business relations.[56] It expected the RDS to take actions in mitigating climate change, encouraging changes in its corporate policies. As the order sought by the Plaintiffs was to push the Defendant to perform a certain way, they were not required to prove a full causal link between the unlawful action and any (imminent and future) damages suffered by the Plaintiffs.[57] Hence, a general causal chain was sufficient.

In contrast to several Indonesian precedents, the Shell Case did not implement the strict liability doctrine. This may be attributed to the deeply ingrained fault-based approach in the Dutch legal system. The equivalent concept to strict liability in the Dutch legal system is *risicoaansprakelijkheid* and its implementation is limited to activities relating to hazardous material processing, hazardous material waste treatment, transporting hazardous materials by sea, river, and land, and drilling that cause explosions.[58] Generally, it has been observed that European countries lack precedents wherein strict liability is triggered and consequently, liability based on fault has become the default rule.[59]

Nonetheless, it may be assumed that a strict liability approach was not applied due to the nature of the claims. In the case of *Shell,* the Plaintiffs aimed at having RDS curb its contributions to climate change through policy changes. In other words, the Plaintiffs specifically focused on the actions of the RDS, rather than the harm incurred. This is further evident in the way the Court assessed the case. Instead of highlighting an already existing harm, the Court spotlighted the responsibility of the RDS in taking actions to reduce its carbon emissions in light of the risks and the possible consequences

[56] Shell Case, para. 4.1.4.

[57] Backes and Veen (n 54) 310.

[58] Abdul Malik, Sanusi and Fajar Sudewo, 'Corporate Strict Liability in Environmental Crimes in Indonesia and the Netherlands', *Proceedings of the 1st International Conference on Law, Social Science, Economics, and Education, MALAPY 2022, 28 May 2022, Tegal, Indonesia* (EAI 2022) 7 <http://eudl.eu/doi/10.4108/eai.28-5-2022.2320558>.

[59] Daniel A Farber, 'How Legal Systems Deal with Issues of Responsibility for Past Harmful Behavior' in Lukas H Meyer and Pranay Sanklecha (eds), *Climate Justice and Historical Emissions* (Cambridge University Press 2017) 101.

that the Netherlands and the Wadden region will face.[60] Strict liability emphasizes the existence of harm, fault-based liability on the other hand, shifts the focus on the company's actions and how their emissions as well as lack of actions contribute to climate change. Conclusively, the latter is more suitable to implement, considering the nature and objective of the claims submitted by the Plaintiffs in the Shell Case.

Application of Article 1365 of the Indonesian Civil Code

Although the expansion of Article 1365 of the Indonesian Civil Code has been unanimously upheld by Indonesian courts, the extent of unwritten law has not been comprehensively addressed. Comparatively, the most notable development apparent in the Shell Case is the Hague District Court's flexible interpretation as it assesses unwritten law by utilizing soft-law instruments as a guidance. As a country that also adopts the civil law system, Indonesian courts are known for its normative approach. This is detrimental when it comes to environmental cases, as merely sticking to legislation or regulations may not yield a sufficient sense of justice. In fact, the Banda Aceh High Court in the *Kalista Alam* case, underscored that judges shall be progressive when adjudicating environmental cases due to its complex nature, such as the fact that they need to be proven with scientific evidence.[61] Consequently, judges shall be valiant in deviating from a strict normative approach and implement environmental principles (i.e. precautionary principle) that have not been stipulated in any statutory provisions.[62]

Reference to the precautionary principle which derives from the 1992 Rio Declaration is often used in environmental cases in Indonesia, although it shall be noted that such a use of the principle alters the mode of liability from fault-based liability under Article 1365 of the Indonesian Civil Code to strict liability. In the *Mandalawangi* case, for instance, the Bandung District Court demonstrated a progressive approach as it recognized the use of the precautionary principle in the 1992 Rio Declaration as a guidance. The Bandung District Court recognized that although the principle at that

[60] Shell Case, para. 4.4.6.
[61] Putusan Pengadilan Tinggi Banda Aceh Nomor 50/PDT/2014/PT.BNA. p. 58.
[62] ibid.

time had not been codified, it still could be used to fill in the existing legal vacuum as Indonesian is a member of the conference.[63] Through the use of the precautionary principle, the Bandung District Court applied the strict liability approach and did not implement fault-based liability envisaged in Article 1365 of the Indonesian Civil Code.[64] Eventually, the Supreme Court reaffirmed the segregation of the precautionary principle enshrined in the Rio Declaration from Article 1365 of the Indonesian Civil Code, emphasizing that the implementation of environmental law shall be in accordance with international standards.[65] As such, in contrast to the Dutch Court in the Shell Case, the Indonesian Supreme Court in the *Mandalawangi* case did not flexibly interpret international standards, specifically the precautionary principle as part of unwritten law under Article 1365 of the Indonesian Civil Code, but rather illustrates the two as mutually exclusive.

The use of soft laws as a guidance to establish fault using Article 1365 of the Indonesian Civil Code is scarce. Soft-law instruments were once used in the *Arie Rompas et al. v. Government of Indonesia* case *(Court Decision No. 118/Pdt.G/LH/2016/PNPlk)* wherein a citizen lawsuit, supported by Friends of the Earth Indonesia (WALHI), was filed against the government, specifically the President, Minister of Environment, Minister of Agriculture, Minister of Agrarian Affairs, Minister of Health, Minister of Home Affairs, Governor of Kalimantan, and the Parliament of Kalimantan, for the forest fires that caused severe haze, resulting in lung infections in fourteen regencies and districts of Central Kalimantan.[66] The Court therein referred to the 1992 Rio Declaration, particularly the intergenerational equity principle to emphasize the obligation of the government in taking measures or in managing environmental issues in Indonesia. Consequently, the government was expected to meet its task in ensuring the needs of the present and the future generations, such as their access to unpolluted air and utilize natural resources to

[63] Mandalawangi Case (Decision No. 49/Pdt.G/2003/PN.BDG), p. 101.

[64] Rizky Banyualam Permana, Dewo Baskoro and Arie Afriansyah, 'Hukum Internasional Made in Garut? Mengkritisi Status Jus Cogens Atas Prinsip Kehati-Hatian Dalam Mandalawangi' (2020) 5 Bina Hukum Lingkungan 157 <https://bhl-jurnal.or.id/index.php/bhl/article/view/130>.

[65] Indonesian Supreme Court Decision No. 1794K/Pdt/2004, p. 84.

[66] *Arie Rompas et al. v. Government of Indonesia* case *(Court Decision No. 118/Pdt.G/LH/2016/PNPlk).*

fulfil their interests.[67] However, a review of the Supreme Court's decision was executed in 2022, wherein it ruled in favor of the government and revoked the previous decisions. Despite the differing judgment in the cassation stage, this does not change the fact that soft law instruments were referred to, thus reflecting the judges' progressive approach in the *Arie Rompas et al. v. Government of Indonesia* case.

Contrary to the Shell Case, unwritten law under Article 1365 of the Indonesian Civil Code is not implemented as a stand-alone basis for the proceeding, as climate change-related litigations in Indonesia still refer to Law No. 32 of 2009 concerning Environmental Protection and Management to prove that a violation or failure to fulfil an obligation under a codified provision had occurred. As a result, other than the *Arie Rompas v. Government of Indonesia* case, the Indonesian courts have yet faced the opportunity to dissect further in the element of unwritten law, specifically in the context of the application of Article 1365 of the Indonesian Civil Code when addressing issues of climate change. Moreover, as indicated in the aforementioned cases above, the lawsuits primarily focus on addressing compensation, rather than the obligation of the corporations to reduce its greenhouse gas emissions.

Nevertheless, the similarity between Indonesia's concept of unlawful act and the Dutch's raises the potential for climate litigations to successfully work if conducted in the Indonesian court. Based on the District Court's considerations and reasoning in the Shell Case, it can be inferred that the Court upholds the use of general tort and human rights principles, which allows its approach to be extensively applied in other jurisdictions, although may be limited to a case by case basis.[68] However, in any event, this would only be possible if the Indonesian Court exercises a flexible interpretative rule like the Dutch District Court when assessing the notion of unwritten law.

The recognition of unwritten law in assessing Article 1365 of the Indonesian Civil Code will further allow the Court to refer to non-binding international Conventions, soft laws, and principles similar to how the District Court in the Shell Case relied on the UNGPs to assert the responsibility of the RDS. Along with the development in the

[67] ibid., pp. 186-187.
[68] Verheyen and Franke (n 7) 403.

Shell Case, the Indonesian Court shall further recognize the advancement of climate litigations, which has been highlighted by the European Commission that non-binding standard, including the UNGPs, are increasingly used to interpret the standard of care that is expected for companies to comply with.[69]

With regard to causality, the *Komari et al. v. Mayor of Samarinda et al*. case constitutes one of the few climate litigation cases in Indonesia which the Plaintiffs utilized Article 1365 of the Indonesian Civil Code and addressed the causality between the conducts and climate change. The Plaintiffs therein highlighted that the coal mining activities in the Samarinda City had drastically contributed to climate change in the East Kalimantan Province, particularly in Samarinda City. In proving so, the Plaintiffs asserted that the production of greenhouse gasses often occurs due to land clearing conducted on forest areas and the burning of coal, causing the emission of significant amounts of carbon dioxide. For context, open pit mining activities in Samarinda encompass an area of 24,376 Ha and bring changes to the landscape, remove early vegetation, cause air pollution, and produce liquid waste that may be acidic.[70] The Plaintiffs subsequently provided proof such as the increase of air temperature in Samarinda City at an average of 0.04 degrees/year and the surged frequency of rain in 2012 to evince that climate change had occurred to due to the emission of greenhouse gasses that entailed due to open pit mining activities. Although the submission used the concept of unlawful act as a basis, the Court did not take the opportunity to dwell deep in the causation aspect of Article 1365 of the Indonesian Civil Code. The use of individual partial responsibility such as in the *Urgenda* and in the Shell Case was also not addressed nor implemented with respect to the use of Article 1365 of the Indonesian Civil Code.

Causality theories used by the Indonesian courts are highly influenced by those used in the Dutch courts. Such theories can be construed into 3 main types: 1) *conditio sine qua non* theory; 2) adequate *veroorzaking* theory; and 3) *toerekening naar redelijkheid* (TNR) theory. First, the *conditio sine qua non* theory, introduced by Von Buri, proposes that the cause of an

[69] Christine Bakker, 'Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 218.

[70] Put No. 138/PDT/2015/PT. SMR, p. 30.

impact constitutes every condition which entails the occurrence of an impact. This theory is too broad to establish causality and thus cannot be utilized in adjudicating civil cases.[71]

On the other hand, the adequate *veroorzaking* theory enforces that a causal nexus is established if the damages 'should have been expected to occur', reflecting the 'closest/ highest possible cause' threshold.[72] Consequently, if the damage is adequately expected to arise from the action, then it is deemed sufficient for a causality link between the action and the damage to exist. The adequate theory is deemed to be followed by Indonesian law, as affirmed by Nindyo Pramono, a prominent professor in private law, when he provided an expert opinion in the *Ministry of Environment and Forestry v. PT. National Sago Prima (Decision No. 591/Pdt.G-LH/2015) PN. Jkt. Sel)* case.[73]

Lastly, the TNR theory, proposed by Koster in 1929, seeks to establish the notion of 'appropriateness liability'. The TNR theory is commonly linked with the request for compensation as it ensures a balanced liability for the parties who are liable to compensate by considering the financial condition of the injured party.[74] The TNR theory was also applied by the Indonesian District Court, particularly by the Sampit District Court in *PT. Langgeng Makmur Sejahtera v. Luhi Torok* (Decision No. 18/Pdt.G/2019/PN.Spt) case. Therein, the plaintiff who is a certificate holder of a land title for palm oil plantation filed a lawsuit against the defendant who had prevented the plaintiff's access to his land. The defendant claimed that such land was owned by him instead. Compensation was sought for by the plaintiff as he claimed that he was unable to harvest palm oil fruits from 2014 to 2019. Through the TNR Theory, the Court asserted that the defendant shall be held liable for the losses suffered by the plaintiff, as long as they incurred due to his actions.

Indonesian courts predominantly adopt the adequate *veroorzaking* theory, however some may also apply the TNR theory. The latter may be difficult to use when establishing a case of similar circumstances as the Shell Case. The use of adequate *veroorzaking* theory on the other hand, may allow Indonesian courts to establish causality between the activities of corporations and climate change. This is possible as the theory endorses the ';should

[71] Rosa Agustina, *Perbuatan Melawan Hukum* (Program Pascasarjana FHUI 2003) 66–69.
[72] ibid.
[73] *PT. Langgeng Makmur Sejahtera v. Luhi Torok* (Decision No. 18/Pdt.G/2019/PN.Spt), p. 388.
[74] Agustina (n 71).

have been expected to occur'' threshold, correlating to the existence of indications of RDS' awareness on the effects of its activities. Thus, if a case like *Shell* occurred in Indonesia, establishing its causality would not be an issue as it could emphasize a corporation's awareness of the great risks its activities were imposing. In the Shell Case for instance, these were evinced through its report, entitled 'The Greenhouse Effect', which detailed its role in limiting greenhouse gas emissions.[75]

Nonetheless, it would be difficult if no reports indicating their awareness are made by the corporation. In such a circumstance, it would then be best to resort to the fair share approach in establishing causality, allowing the Plaintiffs to establish causality on the basis that a corporation cannot free itself from liability by submitting that they are not the only party responsible for climate change. Plaintiffs need to highlight the company's partial individual responsibility to take all necessary measures in accordance with its ability to fight climate change by managing its emissions and ensuring that its contributions will not facilitate climate change risks. Hence, despite the grand scale of climate change as its existence is contributed by many, a corporation still has the partial and active responsibility to prevent such damages from occurring.

Moreover, causality would not be of a huge concern if the Plaintiffs take the same approach of those in the Shell Case by aiming to claim for injunctive relief where they seek for the Court to instruct the Defendant to cease its activities that are contributing to climate change.[76] Establishing causality in climate litigations has been a challenge in other jurisdictions as Plaintiffs claim for individual protective measures or damages, which require them to prove a 'specific causal contribution to a concrete infringement'.[77] On the contrary, claims through injunctive relief are more abstract, as they focus more on the possibility that the defendant's actions could lead to harm, rather than an in-depth analysis on the harm that has already surfaced. This thus allows the Plaintiffs to establish a more general causation.[78]

[75] Shell Case, para. 2.5.9.

[76] Erna Widjajati, 'Ganti Rugi Perbuatan Melawan Hukum Dalam Gugatan Perwakilan Kelompok Di Indonesia' (2011) 18 Jurnal Hukum Ius Quia Iustum 1, 103 <http://journal.uii.ac.id/index.php/IUSTUM/article/view/4000>.

[77] ibid 397.

[78] ibid 396.

Conclusion

The Shell Case essentially provides a different perspective on the way causality is to be established and how unwritten law can be interpreted. The flexible interpretation of unlawful act constitutes a key for judges to hold corporations liable as it allows the use of human rights and soft international law instruments, as long as they are considered universal and globally recognized. The Dutch Court has progressively acknowledged the alignment of principles amongst soft law instruments despite its non-binding nature and thus can be applied against corporations to emphasize a its obligation in reducing its contributions to climate change. While Indonesia has made efforts in imposing liability towards corporations, the legal considerations in these claims are not as advanced and comprehensive when compared to the development in the Shell Case. A conventional and strict approach remains to be the option used when implementing Article 1365 of the Indonesian Civil Code.

Although there are few cases where Indonesian Courts have resorted to soft law instruments in relation to the unwritten law element under Article 1365 of the Indonesian Civil Code, its use is rather scant. Such cases and the similarity between Indonesian and Dutch law, indicates that the future for the advancement of climate change litigations is not utterly bleak. It can be expected that corporations in Indonesia will be asked for their active participation in reducing greenhouse gas emissions. A similar approach as the Shell Case will significantly impact the way corporations in Indonesia formulate their policies with respect to climate change. A two-sided effort is ultimately required; first, from the Plaintiffs, who shall take the innovative option when filing climate change claims and second, from the Judges, who shall be progressive and flexibly interpret Article 1365 of the Indonesian Civil Code.

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