

The Climate Change Litigation Based Human Rights Approach in Corporations: Prospects and Challenges



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ABSTRACT

In recent years, the phenomenon of climate change has emerged as a critical global issue that poses a significant threat to human survival. Industries such as fossil fuels, manufacturing, and agriculture have been identified as major sources of greenhouse gas emissions. Corporate activities have played a role in triggering legal actions holding them accountable for their contribution to climate change. Therefore, this research analyses the prospects and challenges of climate change litigation against corporations in Indonesia using human rights approach. This research has adopted normative legal research with a statutory and historical approach. Descriptive analysis is applied to analyze the data. This paper reveals that the use of human rights approach can strengthen arguments against corporations over climate change. This paper concludes that despite the challenge that may arise, there is a big chance for successful climate change litigation against corporations in Indonesia by using human rights approach as the main claim.



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1. Introduction

The increase in extreme weather, natural disasters, and damage to ecosystems as a result of climate change has brought a serious threat to humans. This is inseparable from the increase in Green House Gas (hereinafter referred to as GHG) emissions every year which increases the temperature of the earth's surface.¹ The Intergovernmental Panel on Climate Change (hereinafter referred to as IPCC) report for 2022 also describes in detail the impact that will occur if there is no immediate effort to suppress rising temperatures and the release of GHG emissions into the atmosphere.² Without any effort from all parties to solve the problem, the

¹ David E. Reichle, 'Carbon, Climate Change, and Public Policy', in *The Global Carbon Cycle and Climate Change* (Elsevier, 2023), 503–70 <https://doi.org/10.1016/B978-0-443-18775-9.00015-2>.

² Javiera Barandiaran and Sebastián Rubiano-Galvis, 'An Empirical Study of EIA Litigation Involving Energy Facilities in Chile and Colombia', *Environmental Impact Assessment Review*, 79 (2019), 106311–106311 <https://doi.org/10.1016/j.eiar.2019.106311>.

destruction of planet Earth as a place for humans to live is only a matter of time.³ Furthermore, the effects of climate change affected the enjoyment of human rights. For instance, the effect of climate change affected the right to health, where climate change can contribute to the spread of diseases, air pollution, and inadequate access to clean water and sanitation, affecting people's right to enjoy the highest attainable standard of physical and mental health.⁴ In addition, the right to housing is most likely affected by climate change which can result in sea-level rise, increased flooding, and land degradation, leading to displacement, loss of homes, and challenges in accessing adequate housing.⁵ These are just a few examples, and there are many more examples of additional rights that can be impacted by climate change depending on the specific circumstances and contexts. Therefore, there is a direct link between human rights violations and the effects of climate change.

One of the parties contributing to the increasing temperatures is corporate activity, especially companies that are members of the Carbon Majors. The corporate activities that release GHG emissions into the atmosphere also contribute to the increasing impact of climate change.⁶ Even though the activities carried out have caused a large impact, most corporations still do not have sufficient responsibility to repair the damage caused by their activities. This becomes ironic if the wealth of corporations that contribute to climate change is compared to the number of victims of the effects of climate change.⁷

The company's activities and their impact on climate change trigger a reaction from human rights activists and people concerned about the issue of climate change to demand corporate responsibility for climate change in court.⁸ This can be seen in a large number of climate change lawsuits worldwide against corporations, especially companies that are included in the Carbon Majors. Most

³ Seema Arora-Jonsson and Jeannette Gurung, 'Changing Business as Usual in Global Climate and Development Action: Making Space for Social Justice in Carbon Markets', *World Development Perspectives*, 29 (2023), 100474–100474 <https://doi.org/10.1016/j.wdp.2022.100474>.

⁴ Theresa Watts and Sandra O. Brugger, 'The Intersection between Climate Change, COVID-19, and Future Pandemics – Perspectives among American Transportation Network Drivers', *Journal of Transport & Health*, 2023, 101582 <https://doi.org/10.1016/j.jth.2023.101582>

⁵ Natalie Teasdale and Peter K Panegyres, 'Climate Change in Western Australia and Its Impact on Human Health', *The Journal of Climate Change and Health*, 12 (2023), 100243 <https://doi.org/10.1016/j.JOCLIM.2023.100243>

⁶ Benjamin K. Sovacool and Alexander Dunlap, 'Anarchy, War, or Revolt? Radical Perspectives for Climate Protection, Insurgency and Civil Disobedience in a Low-Carbon Era', *Energy Research & Social Science*, 86 (2022), 102416–102416 <https://doi.org/10.1016/j.erss.2021.102416>.

⁷ Matthew Megura and Ryan Gunderson, 'Better Poison Is the Cure? Critically Examining Fossil Fuel Companies, Climate Change Framing, and Corporate Sustainability Reports', *Energy Research & Social Science*, 85 (2022), 102388–102388 <https://doi.org/10.1016/j.erss.2021.102388>.

⁸ Huma Sarwar and others, 'Achieving Business Competitiveness through Corporate Social Responsibility and Dynamic Capabilities: An Empirical Evidence from Emerging Economy', *Journal of Cleaner Production*, 386 (2023) <https://doi.org/10.1016/j.jclepro.2022.135820>

of these lawsuits demand corporate responsibility for its contribution to climate change in the past as highlighted in the *Beijing Fengfujiuxin Marketing and Technology Co. Ltd. v Zhongyan Zhichuang Blockchain Co. Ltd.*⁹ These lawsuits also often include arguments about fraud and disinformation on the part of companies regarding climate change itself as can be seen in the *Altroconsumo v. Volkswagen Aktiengesellschaft and Volkswagen Group Italia S.p.A.*¹⁰ In addition, there are also other climate change litigation lawsuits as demonstrated in the *Millieudensie v. Shell* that focus on demands related to corporate frameworks, enforcement of climate standards, failure to adapt to the impacts of climate change, compensation, and "climate washing" from corporations that contribute to climate change.¹¹

The latest decision of the Hague District Court that has attracted attention and has become one of the landmark cases is *Millieudensie v. Shell*. The Court granted the lawsuit filed by Milieudensie and other environmental organizations regarding the activities of Royal Dutch Shell which contribute to climate change.¹² Further, the Court ordered Shell to reduce carbon dioxide emissions by up to 45% in 2030 compared to 2010 emissions and up to zero emissions in 2050 in accordance with the Paris Agreement. This brings fresh air to the development of climate change litigation against corporations because in the end corporations can be held accountable for their activities that contribute to climate change.¹³ In addition, the decision of *Millieudensie v. Shell* raise the issue between the violations of human rights and the effect of climate change. In this regard, the Court held that there is a direct link between the enjoyment and protection of human rights and the effect of climate change contributed by corporations.¹⁴

The success of the *Milieudensie v. Shell* raises an interesting question regarding the chances of success for climate change litigation against corporations if brought to Indonesia. This is important for Indonesia considering that the problems and impacts of climate change are triggered by corporate activities that contribute to GHG emissions into the atmosphere, especially corporations operating on fossil fuels.¹⁵ Through climate change litigation against corporations that demand

⁹ Megura and Gunderson.

¹⁰ Megura and Gunderson.

¹¹ Xinxin Wang and Kevin Lo, 'Civil Society, Environmental Litigation, and Confucian Energy Justice: A Case Study of an Environmental NGO in China', *Energy Research & Social Science*, 93 (2022), 102831–102831 <https://doi.org/10.1016/j.erss.2022.102831>.

¹² John F. McEldowney, 'Climate Change and the Law', in *The Impacts of Climate Change* (Elsevier, 2021), 503–19 <https://doi.org/10.1016/B978-0-12-822373-4.00018-5>.

¹³ Qiping Huang and Meimei Lin, 'Do Climate Risk Beliefs Shape Corporate Social Responsibility?', *Global Finance Journal*, 53 (2022) <https://doi.org/10.1016/j.gfj.2022.100739>

¹⁴ Jin Dong Park and others, 'Revisiting Sustainability Disclosure Theories: Evidence from Corporate Climate Change Disclosure in the United States and Japan', *Journal of Cleaner Production*, 382 (2023) <https://doi.org/10.1016/j.jclepro.2022.135203>

¹⁵ Jacqueline Peel and Hari M. Osofsky, 'Climate Change Litigation', *Annual Review of Law and Social Science*, 16.1 (2020), 21–38 <https://doi.org/10.1146/annurev-lawsocsci-022420-122936>.

corporate responsibility for their activities that contribute to climate change, it is hoped that corporate awareness will arise to get involved in efforts to reduce GHG emissions.¹⁶ Thus, the contribution to the amount of GHG can be reduced and the planet earth and its contents can continue to be sustainable and sustainable for the benefit of future generations.¹⁷ This is essential for the Indonesian climate change litigation strategy, whereas from 12 climate change litigation cases, 9¹⁸ of them are litigation against corporations and none of them was successfully articulate the legal obligations for corporations to reduce their GHG emission in accordance with the Paris Agreement timeline. The 9 climate change litigation cases in Indonesia also unsuccessfully utilized a human rights-based approach to establishing a legal obligation for corporations to reduce their GHG emission. This is because the 9 climate change litigation cases focus on the issue of short-term solutions for climate change which is compensation for damages caused by corporations. Therefore, this research will analyze the prospects and challenges of using the human rights-based approach in climate change litigation against corporations in Indonesia.

2. Research Method

This research is based on normative legal research, using an international law perspective in relation to climate change mitigation using the human rights approach. In this research, the authors use a statutory approach and historical approach, especially when dealing with the issue of climate change litigation with the human rights approach against corporations. The data collection method in this research utilizes a library search by accessing a range of relevant literature sources. The data is collected through the process of reading, analyzing, and summarizing relevant documents, including treaties, legal books, legal journals, and other sources that are associated with the central issue of this research. Descriptive analysis is applied to analyze the data. Furthermore, the data is examined in light of legal principles, treaties, and other relevant rules, taking into account the juridical framework.

¹⁶ Milja Heikkinen and others, 'Climate Partners of Helsinki: Participation-Based Structures and Performance in a City-to-Business Network Addressing Climate Change in 2011–2018', *Urban Climate*, 45 (2022), 101250–101250 <https://doi.org/10.1016/j.uclim.2022.101250>.

¹⁷ Gianni Guastella and others, 'Climate Reputation Risk and Abnormal Returns in the Stock Markets: A Focus on Large Emitters', *International Review of Financial Analysis*, 84 (2022), 102365–102365 <https://doi.org/10.1016/j.irfa.2022.102365>.

¹⁸ *Ministry of Environment and Forestry v. PT Merbau Pelelawan Lestari, Minister of Environment v. PT Selatnasik Indokwarsa and PT Simpang Pesak Indokwarsa, Ministry of Environment and Forestry v. PT Rambang Agro Jaya, Ministry of Environment and Forestry v. PT Asia Palembang Lestari, Ministry of Environment and Forestry v. PT Arjuna Utama Sawit, Ministry of Environment and Forestry v. PT Palma Utama, Ministry of Environment and Forestry v. PT Jatim Jaya Perkasa, Ministry of Environment and Forestry v. PT Bumi Mekar Hijau, and Minister of Environment v. PT Kalista Alam*. Please see more at: <http://climatecasechart.com/non-us-jurisdiction/indonesia/>.

3. Results and Discussion

Climate Change Litigation Against Corporations

Climate change litigation against corporations develops to target corporate responsibility for the impact of its activities on climate change.¹⁹ There are several reasons why climate change litigation against corporations is possible to bring into court. The first reason is that the development and consolidation of climate-related science, based on reports issued by the IPCC, are enhanced by the availability of better and more up-to-date local data collection.²⁰ Second, there is an increased possibility to measure the contribution of emitting corporations in the world that contribute to climate change in a more proportional manner.²¹ Third, there is the development of hard science attribution, in which researchers have succeeded in proving that extreme weather is related to climate change, one of which is caused by corporate activities that release emissions into the atmosphere by tracking company emissions from time to time and their relationship to carbon dioxide accumulation into the atmosphere, rising temperatures and sea levels.²² These reasons can increase the chances of success of climate change litigation against corporations.²³

In practice, climate change lawsuits against corporations are not without challenges. First, scientific reasons are not a guarantee that the lawsuit will be accepted by the court because the causal relationship between scientific reasons and specific cases in terms of corporate liability is still considered too far by the courts.²⁴ Second, corporations can refuse to pay compensation costs due to climate change if the lawsuit is granted by the judge on the grounds that not all

¹⁹ Asil Azimli, 'The Impact of Climate Policy Uncertainty on Firm Value: Does Corporate Social Responsibility Engagement Matter?', *Finance Research Letters*, 51 (2023) <https://doi.org/10.1016/j.frl.2022.103456>

²⁰ Guastella and others. Abdul Kadir Jaelani, Resti Dian Luthviati, and Muhammad Jihadul Hayat, 'Permits for the Transfer of Agricultural Land Functions to Non-Agriculture in the Land Purchasing and Sale Process', in *International Conference on Environmental and Energy Policy (ICEEP 2021)* (Atlantis Press, 2021), pp. 216–19 <https://doi.org/10.2991/assehr.k.211014.046>

²¹ Tayanah O'Donnell, 'Coastal Lawscape: A Framework for Understanding the Complexities of Climate Change Adaptation', *Marine Policy*, 129 (2021), 104532–104532 <https://doi.org/10.1016/j.marpol.2021.104532>.

²² H. Morais and others, 'Combined Effects of Climate Change and Environmentally Relevant Mixtures of Endocrine Disrupting Compounds on the Fitness and Gonads' Maturation Dynamics of *Nucella Lapillus* (Gastropoda)', *Marine Pollution Bulletin*, 190 (2023), 114841–114841 <https://doi.org/10.1016/j.marpolbul.2023.114841>.

²³ Lego Karjoko and others, 'Indonesia's Sustainable Development Goals Resolving Waste Problem: Informal to Formal Policy', *International Journal of Sustainable Development and Planning*, 17.2 (2022), 649–58 <https://doi.org/10.18280/ijstdp.170230>

²⁴ Khaldoon Albitar, Habiba Al-Shaer, and Yang Stephanie Liu, 'Corporate Commitment to Climate Change: The Effect of Eco-Innovation and Climate Governance', *Research Policy*, 52.2 (2023), 104697–104697 <https://doi.org/10.1016/j.respol.2022.104697>.

compensation costs due to climate change can be covered by insurance.²⁵ Seeing these challenges, Ganguly, Setzer, and Heyvaert expressed their doubts that climate change litigation against corporations would achieve the expected success.²⁶

If we look at the development of judge decisions related to climate change litigation around the world, then what was worried about by Ganguly, Setzer, and Heyvaert in 2011 began to experience a shift. This is evident from the existence of climate change litigation cases against corporations that have succeeded in becoming landmark cases, namely the *Milieudefensie v. Shell*. The case was decided by the same court as *the State of the Netherlands v. Urgenda Foundation*, namely The Hague District Court. The success of the *Milieudefensie v. Shell* has shown that climate change litigation against corporations is not impossible and will surely fail as previously feared, but on the contrary, it is possible and has a chance of success.

The *Milieudefensie v. Shell* begin on April 5, 2019, when a number of environmental organizations in the Netherlands represented by Milieudefensie and friends filed a lawsuit against Royal Dutch Shell (hereinafter referred to as Shell). The lawsuit was filed on the grounds that Shell's activities contributed to climate change which was deemed to have violated the duty of care under the Dutch Civil Code and human rights obligations. The plaintiff argued that Shell has a duty of care to take action in order to reduce GHG emissions based on three arguments: 1) the objectives of the Paris Agreement; 2) scientific evidence related to the dangers of climate change, and 3) legal instruments according to the Dutch Civil Code and the European Convention on Human Rights (hereinafter referred to as ECHR). According to the plaintiff, Shell failed to take action to reduce the impact of climate change. In fact, Shell has knowledge of climate change and its impact in the long term will endanger the survival of Dutch citizens. The plaintiffs asked the judge to order Shell to reduce carbon dioxide emissions by 45% by 2030 compared to 2010 emissions and up to zero emissions by 2050 in accordance with the Paris Agreement.²⁷

After that, Milieudefensie and Shell argued for 782 days in the courtroom. The debate arose regarding whether Shell's actions violated unwritten legal provisions based on Book 6 Article 162 of the Dutch Civil Code and violated the right to life and respect for private and family life, home, and correspondence based on

²⁵ Danuta de Grosbois and David A. Fennell, 'Determinants of Climate Change Disclosure Practices of Global Hotel Companies: Application of Institutional and Stakeholder Theories', *Tourism Management*, 88 (2022), 104404–104404 <https://doi.org/10.1016/j.tourman.2021.104404>.

²⁶ Weidong Xu and others, 'Does Global Climate Risk Encourage Companies to Take More Risks?', *Research in International Business and Finance*, 61 (2022), 101658–101658 <https://doi.org/10.1016/j.ribaf.2022.101658>.

²⁷ Adam D. Krauss, 'Effect of Climate Change on the Insurance Sector', in *The Impacts of Climate Change* (Elsevier, 2021), 397–436 <https://doi.org/10.1016/B978-0-12-822373-4.00014-8>.

Articles 2 and 8 of the ECHR.²⁸ This can be seen in the response from Shell in November 2019, in which Shell argued that there was no legal, statute, or other standard which stipulated that Shell's actions conflicted with unwritten legal provisions if Shell failed to comply with emission limits.²⁹ Shell also believes that the plaintiff's claim is too general to fall within the scope of Articles 2 and 8 of the ECHR.³⁰

Finally, the panel of judges at the Hague District Court rendered its decision on 26 May 2021. The panel of judges accepted the plaintiff's claim and imposed a penalty against Shell to reduce carbon dioxide emissions by up to 45% in 2030 when compared to 2019 emissions in all of the company's activities, from production to sales and use.³¹ The Court held that Shell violated the unwritten law regarding the standard of care based on Book 6 Article 162 of the Dutch Civil Code by not implementing adequate policies to prevent the harmful effects of climate change.³² However, the panel of judges gave Shell freedom in allocating emission reductions for its activities by stopping new investments in fossil fuel extraction and/or limiting the production of fossil fuel resources, provided that the total of all allocations for such reductions reaches 45% as ordered.³³

There are two main points postulated by Milieudefensie and friends. The first argument is human rights which basically refers to the State of *the Netherlands v. Urgenda Foundation*. The plaintiffs argued that what Shell had done violated the human rights of the Dutch people, especially with regard to the right to life as an individual, family, and property under Article 2 and 8 of ECHR.³⁴ Further, this argument then elaborated by the plaintiffs' argument outlines how Shell's extensive awareness of climate change over time, dissemination of misleading information regarding climate change, and insufficient measures taken to mitigate climate change collectively contribute to establishing Shell's illegal endangerment of Dutch citizens and actions that amount to perilous negligence and therefore, a direct violation of right to life and respect for private and family life, home and correspondence under Article 2 and 8 of ECHR.

²⁸ Christophe Bonneuil, Pierre-Louis Choquet, and Benjamin Franta, 'Early Warnings and Emerging Accountability: Total's Responses to Global Warming, 1971–2021', *Global Environmental Change*, 71 (2021), 102386–102386 <https://doi.org/10.1016/j.gloenvcha.2021.102386>.

²⁹ Krauss.

³⁰ Krauss.

³¹ Li Ai and Lucia S. Gao, 'Firm-Level Risk of Climate Change: Evidence from Climate Disasters', *Global Finance Journal*, 55 (2023), 100805–100805 <https://doi.org/10.1016/j.gfj.2022.100805>.

³² Ai and Gao.

³³ Sidan Wang and Süleyman Orhun Altıparmak, 'Framing Climate Strategy of the Oil Industry of China: A Tailored Approach to Ecological Modernization', *Chinese Journal of Population, Resources and Environment*, 20.4 (2022), 324–31 <https://doi.org/10.1016/j.cjpre.2022.11.003>.

³⁴ Nicky van Dijk, 'From Exacerbating the Anthropocene's Problems to Intergenerational Justice: An Analysis of the Communication Procedure of the Human Rights Treaty System', *Earth System Governance*, 10 (2021), 100123–100123 <https://doi.org/10.1016/j.esg.2021.100123>.

Although the claimants were unable to directly invoke ECHR rights against the defendant, the Court acknowledged the significance of human rights within the claimants' relationship with the defendant. Consequently, the Court expressed its intention to consider human rights and the principles they embody when interpreting the unwritten standard of care. Referring *Urgenda* as a precedent, the court acknowledged that Articles 2 and 8 of the ECHR provide protection against the ramifications of hazardous climate change caused by CO2 emissions.³⁵ The Court recognized the need to expand the interpretation of human rights protection to encompass situations where environmental harm arises from activities that result in environmental destruction or natural disasters. This expanded interpretation acknowledges the inherent connection between human rights and the preservation of life and livelihood, emphasizing individuals' right to a safe and healthy environment free from the detrimental consequences of environmental degradation.³⁶ By broadening the interpretation, the Court ensures that the right to life, as well as the right to respect personal and family life under Article 8 of the ECHR, includes circumstances where environmental damage poses a threat to people's lives and livelihoods. It acknowledges that the severe and irreversible consequences resulting from climate change, such as rising sea levels, extreme weather events, and the destruction of ecosystems, directly endanger the human rights of individuals residing in the Netherlands.³⁷

In essence, the Court recognizes the interconnectedness between environmental concerns and human rights and emphasizes the importance of safeguarding both. It highlights that the human rights arguments put forth by the plaintiff, specifically referencing the right to life and the right to respect personal and family life, must be understood in a manner consistent with environmental protection. This broader interpretation reflects the recognition that environmental harm arising from activities causing environmental destruction or natural disasters poses a direct menace to human rights. Ultimately, addressing environmental destruction and climate change becomes essential for ensuring the full realization of human rights and the preservation of life and livelihoods.³⁸

Meanwhile, the second argument is the existence of an internal obligation within Shell itself related to climate change. Shell is aware of the impact of climate change, one of which is caused by its activities and is committed to contributing to

³⁵ Peel and Osofsky.

³⁶ Jorge Heredia and others, 'A Configuration Approach to Explain Corporate Environmental Responsibility Behavior of the Emerging Economies Firms at Industry 4.0', *Journal of Cleaner Production*, 395 (2023) <https://doi.org/10.1016/j.jclepro.2023.136383>

³⁷ Lamia Chourou, Darlene Himick, and Samir Saadi, 'Regulatory Uncertainty and Corporate Social Responsibility', *Finance Research Letters*, 55 (2023), 104020 <https://doi.org/10.1016/J.FRL.2023.104020>

³⁸ Peel and Osofsky.

reducing the impact of climate change through reducing emissions.³⁹ However, Shell did not carry out this obligation. Both arguments contributed to the plaintiffs' victory in the *Milieudéfensie v. Shell*.

Another interesting issue in this case is the legal argument used by the Plaintiff in winning his case, namely by using the corporate obligation to carry out the duty of care which is unwritten in the Dutch Criminal Code to prevent dangerous climate change through corporate policies set for the Shell group of companies. Apart from the human rights argument as mentioned in the previous section, *the Milieudéfensie v. Shell* also refers to the soft law in the form of the United Nations Guiding Principles on Business and Human Rights (hereinafter referred to as UNGP) and Shell's internal policy regarding due diligence on environmental impacts. Even though the two instruments are not legally binding, this development is very important because it recognizes the impossibility of implementing effective climate change policies without significant real action from the private sector, especially by large corporations covering various countries.

More specifically, the case of *Milieudéfensie v. Shell* refers to Article 15 of the UNGP which states that in terms of corporate obligations to protect human rights, there must be a human rights protection policy, implementation of human rights-based due diligence to prevent, mitigate and be responsible for impacts on human rights and also a remediation process for adverse human rights impacts that occur it has been implemented.⁴⁰ The implication of this arrangement is the determination of responsibility for the state and more specifically corporations in relation to the protection of human rights. The Dutch Court's recognition of the UNGP as an authoritative and internationally supported soft law instrument is another positive aspect of this case.⁴¹ The Dutch court also stated that Shell's commitment to the UNGP was irrelevant and considered the UNGP a global standard of behavior for corporations in the protection of human rights, which even went above and beyond their compliance with national laws and regulations.

³⁹ Harro van Asselt, 'Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of "Leaving It in the Ground"', *Earth System Governance*, 9 (2021), 100118–100118 <https://doi.org/10.1016/j.esg.2021.100118>.

⁴⁰ Daniel P. Loucks, 'Impacts of Climate Change on Economies, Ecosystems, Energy, Environments, and Human Equity: A Systems Perspective', in *The Impacts of Climate Change* (Elsevier, 2021), 19–50 <https://doi.org/10.1016/B978-0-12-822373-4.00016-1>.

⁴¹ Hsiao-Min Chen, Tsai-Chi Kuo, and Ju-Long Chen, 'Impacts on the ESG and Financial Performances of Companies in the Manufacturing Industry Based on the Climate Change Related Risks', *Journal of Cleaner Production*, 380 (2022), 134951–134951 <https://doi.org/10.1016/j.jclepro.2022.134951>.

Prospects of Climate Change Litigation Against Corporations: Human Rights Development and Recognition of Indonesian Regulations

The innovative legal argument in the *Milieudefensie v. Shell*, as mentioned in the previous section, Shell provides hope and should be used as inspiration for world climate change litigation cases. One of the most striking and significant arguments in the case is the use of human rights arguments in constructing cases, especially with the absence of strict recognition of the right to the environment in the laws and regulations that apply in the European Union.⁴²

Recognition of human rights as one of the arguments in fighting against climate change, both in international negotiations and litigation, is a relatively new development in the international community.⁴³ This link was first raised by the United Nations Human Rights Council (hereinafter referred to as UNHRC) in 2008 through UNHRC Resolution No. 7/23 which stated that there is a direct threat from climate change to people around the world which has implications for human rights violations.⁴⁴ This resolution together with research by the Office of the UN High Commissioner for Human Rights (hereinafter referred to as OHCHR) further examines the relationship between human rights and climate change which was released in 2009. The research from the OHCHR shows that there is an intrinsic relationship between extreme weather conditions due to climate change and injury Human rights are owned by humans, namely the right to life, the right to health, the right to water, the right to adequate housing, and the right to self-determination. In addition, this research also shows that there is a close relationship between the damage caused by climate change and the threat to international peace and security.⁴⁵

Although international human rights instruments, such as the Universal Declaration on Human Rights (hereinafter referred to as UDHR), the International Convention on Civil and Political Rights (hereinafter referred to as ICCPR), and the International Convention on Economic, Social, and Cultural Rights (hereinafter

⁴² Rose Mayembe and others, 'Integrating Climate Change in Environmental Impact Assessment: A Review of Requirements across 19 EIA Regimes', *Science of The Total Environment*, 869 (2023), 161850–161850 <https://doi.org/10.1016/j.scitotenv.2023.161850>.

⁴³ Elena Lioubimtseva and Charlotte da Cunha, 'Local Climate Change Adaptation Plans in the US and France: Comparison and Lessons Learned in 2007-2017', *Urban Climate*, 31 (2020), 100577–100577 <https://doi.org/10.1016/j.uclim.2019.100577>.

⁴⁴ Juliana Reu Junqueira, Silvia Serrao-Neumann, and Iain White, 'Managing Urban Climate Change Risks: Prospects for Using Green Infrastructure to Increase Urban Resilience to Floods', in *The Impacts of Climate Change* (Elsevier, 2021), 379–96 <https://doi.org/10.1016/B978-0-12-822373-4.00013-6>.

⁴⁵ Anisa Devi Friasmita and Farah Hafizha Nisa, 'Securing State's Asset: Legal Protection of Natural Resources of Oil and Gas', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 1.1 (2023), 18–24. <https://doi.org/10.53955/jsderi.v1i1.4>

referred to as ICESCR) do not directly recognize environmental rights, research this shows that these international agreements have laid a vital basis for human rights arguments in the climate struggle. This is because these agreements recognize the right to the environment indirectly through the basic rights contained therein, such as the right to life, the right to health, and others.⁴⁶

UNHRC has also continued to issue resolutions in recent years that link the impact of climate change on human rights, especially its disproportionate impact on vulnerable communities, such as children, people with disabilities, the poor, and others.⁴⁷ This argument becomes even stronger with the recognition of human rights in the considerations of the Paris Agreement which states that taking action to address climate change must be accompanied by respecting, promoting and considering each country's obligations to human rights. The Paris Agreement also has important provisions on adaptation, mitigation, and for the first time regulates losses and damage from climate change. Together with the ambitious goals proclaimed in Article 4 of the Paris Agreement, this agreement can be said as an acknowledgment to protect and minimize the impact of climate change, especially on vulnerable communities.⁴⁸

The implementation of human rights arguments in the climate struggle does not only stop at the formulation of international policies and agreements but has also been used as an argument in climate change litigation.⁴⁹ In 2018, Jacqueline Peel and Hari Osofsky identified two landmark cases that changed the landscape of climate change litigation, namely *Leghari v. Federation of Pakistan* and *Urgenda v. The State of the Netherlands*.⁵⁰ The case of *Leghari v. Federation of Pakistan*. These two cases provide a basic framework and become the forerunner of the global climate change litigation struggle with human rights arguments.⁵¹ Likewise, the case of *Milieudefensie v. Shell*, one of the factors in its victory, was influenced by the use of human rights arguments, particularly the right to life and the right to respect personal and family life as regulated in Articles 2 and 8 of the ECHR.

⁴⁶ Iqbal Iqbal and Hilmi Rayhannafi, 'Legal Politics toward Natural Energy: Natural Gas Utilization in Indonesia', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 1.1 (2023), 25–30.

⁴⁷ Thijs Etty and others, 'Ten Years On: Rethinking Transnational Environmental Law', *Transnational Environmental Law*, 10.3 (2021), 391–400 <https://doi.org/10.1017/S2047102521000303>.

⁴⁸ Sébastien Jodoin, Annalisa Savaresi, and Margaretha Wewerinke-Singh, 'Rights-Based Approaches to Climate Decision-Making', *Current Opinion in Environmental Sustainability*, 52 (2021), 45–53 <https://doi.org/10.1016/j.cosust.2021.06.004>.

⁴⁹ Kristian Høyer Toft and Mogens Rüdiger, 'Mapping Corporate Climate Change Ethics: Responses among Three Danish Energy Firms', *Energy Research & Social Science*, 59 (2020), 101286–101286 <https://doi.org/10.1016/j.erss.2019.101286>.

⁵⁰ Peel and Osofsky.

⁵¹ Fred Pearce, 'Polluter Pays?', *New Scientist*, 239.3191 (2018), 38–41 [https://doi.org/10.1016/S0262-4079\(18\)31484-2](https://doi.org/10.1016/S0262-4079(18)31484-2). Mutiara Maharani and Nabbiel Arbio Akbar, 'Utilization of Petroleum and Natural Gas on the Sustainable Development of Indonesian Economy', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 1.1 (2023), 1–8. <https://doi.org/10.53955/jsderi.v1i1.4>

Savaresi and Setzer noted that in 2022 the trend of climate change litigation with human rights arguments continued to increase with 112 (one hundred and twelve) cases found. These cases attempted to demand accountability from both the state and private business actors.⁵² Out of 112 (one hundred and twelve) cases using human rights arguments, 93 (ninety-three) cases were brought to the government and only 19 (nineteen) cases were brought to corporations. The government and corporations are asked to take adequate climate action with the aim of filling the void in law enforcement left by the apparatus of international or national laws that have not provided adequate sanctions for climate destruction.⁵³

In Indonesia, there is potential for replicating the success of *Milieudefensie v. Shell*, as there has been recognition of the right to the environment both in substance and procedurally within the country.⁵⁴ Unlike the *Milieudefensie v. Shell* case, where the issue of the right to the environment was raised by the plaintiff, in Indonesia there is already an existing recognition of this right. This provides a favorable foundation for climate change litigation, as the legal framework acknowledges the importance of environmental rights. By building upon this recognition, climate change litigation in Indonesia can further emphasize the connection between human rights and the environmental harms caused by corporate activities, potentially leading to similar outcomes as the *Milieudefensie v. Shell* case.

The recognition of substantive human rights in the environmental field can be seen clearly in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) which recognizes the right to a good and healthy environment. This is emphasized again by Article 3 letters (g) Law Number 32 of 2009 concerning Environmental Protection and Management (hereinafter referred to as UU PPLH) which states that environmental protection and management is based on the right to the environment as a human right. In addition to the substantive rights mentioned earlier, there are also procedural rights that are currently protected in Indonesia. These procedural rights include participation in environmental policymaking, the right to receive environmental education, access to information, and access to justice. In terms of access to justice, the PPLH Law has recognized the legal standing and rights of lawsuits from the community and environmental

⁵² Louise du Toit and Louis J. Kotzé, 'Reimagining International Environmental Law for the Anthropocene: An Earth System Law Perspective', *Earth System Governance*, 11 (2022), 100132–100132 <https://doi.org/10.1016/j.esg.2022.100132>.

⁵³ Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases', *German Law Journal*, 22.8 (2021), 1484–98 <https://doi.org/10.1017/glj.2021.83>.

⁵⁴ Geoffrey Supran and Naomi Oreskes, 'Rhetoric and Frame Analysis of ExxonMobil's Climate Change Communications', *One Earth*, 4.5 (2021), 696–719 <https://doi.org/10.1016/j.oneear.2021.04.014>.

organizations.⁵⁵ In fact, Sembiring and Baihaqie in their writing stated that the legal rights protected in Indonesia are more flexible and flexible for the implementation of private climate change litigation in the absence of complicated lawsuit requirements such as in the United States. Other procedural rights such as the right to obtain information also have their regulations, namely Law Number 14 of 2008 concerning Public Information Disclosure (hereinafter referred to as UU KIP), where the preamble also states that access to information is included as a human right and is an important feature in a democratic country. Law Number 39 of 1999 concerning Human Rights (hereinafter referred to as UU HAM) also guarantees procedural rights related to the environment which include the right to information, the right to participation, and the right to access justice.⁵⁶

Based on the explanation above, Indonesia has an advantage over European Union countries and the United States because it already has the recognition of substantive and procedural rights both in general and specifically in the environmental field. Thus, Indonesia has completed one of two factors to apply constitutional rights in climate change litigation. This is as stated by Peel and Osofsky, that in addition to regulations and procedures for submitting rights, progressive judicial practices with the acceptance of new arguments are needed.⁵⁷

Challenges of Climate Change Litigation Against Corporations in Indonesia: Uncertainty and Legal Vacuum

As described in the previous section, *Milieudefensie v. Shell* clearly uses human rights arguments as an important and main argument in its proof. The use of arguments stating that climate change injures human rights has not been used explicitly in climate change litigation cases in Indonesia. This fact is very unfortunate because the right to the environment which is regulated explicitly in the constitution and laws and regulations is a human right, so environmental damage, which in this case includes climate change, must be seen as a violation of human rights as well and can be used as an argument in fighting for climate change cases in the realm of litigation.⁵⁸

Cases such as Komari and the civil lawsuit against the Indonesian government regarding air pollution in Jakarta have not yet explicitly invoked human rights-based arguments. Furthermore, judges in Indonesia have lost a golden

⁵⁵ Turlough F. Guerin, 'Roles of Company Directors and the Implications for Governing for the Emerging Impacts of Climate Risks in the Fresh Food Sector: A Review', *Food Control*, 133 (2022), 108600–108600 <https://doi.org/10.1016/j.foodcont.2021.108600>.

⁵⁶ Kyra Bos and Joyeeta Gupta, 'Stranded Assets and Stranded Resources: Implications for Climate Change Mitigation and Global Sustainable Development', *Energy Research & Social Science*, 56 (2019), 101215–101215 <https://doi.org/10.1016/j.erss.2019.05.025>.

⁵⁷ Peel and Osofsky.

⁵⁸ Mickaele Le Ravalec, Alexandre Rambaud, and Véronique Blum, 'Taking Climate Change Seriously: Time to Credibly Communicate on Corporate Climate Performance', *Ecological Economics*, 200 (2022), 107542–107542 <https://doi.org/10.1016/j.ecolecon.2022.107542>.

opportunity to use international documents such as UNHRC resolutions linking human rights violations to climate change to support the human rights arguments put forward by the plaintiffs.⁵⁹ In Indonesia, as stipulated in Article 7 of the Human Rights Law, human rights violations can be sought for legal remedies through national forums, namely courts or commissions, and international forums. However, this article does not clearly explain specific conditions and mechanisms for upholding human rights. At this time, there is also no special forum or special procedural law mechanism in enforcing these human rights violations. Thus, there is still no certainty whether the argumentation of human rights violations can be used or not.⁶⁰ In addition to these uncertainties, the jurisdiction of human rights courts in Indonesia is limited to gross human rights violations. Thus, if it is related to human rights violations in climate change cases, there is a possibility that there will be difficulties in using a human rights court because it is not certain that these cases can be classified as gross human rights violations.⁶¹

The existence of a company can certainly have an impact on its surroundings, be it social, environmental, or other impacts. In terms of environmental impacts, company activities can potentially cause negative impacts such as pollution and environmental damage.⁶² Therefore, in Indonesia, it has been regulated regarding Environmental Social Responsibility (also known as Corporate Social Responsibility hereinafter referred to as CSR), namely in Article 74 of Law no. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as Company Law). When referring to Article 1 Point 3 of the Company Law, CSR is defined as a company's commitment to take a role in sustainable economic development. Article 74 of the Company Law stipulates that companies that carry out their business activities in the field of and/or related to natural resources are required to carry out social and environmental responsibility. If not, sanctions will be imposed as regulated in Government Regulation No. 47 of 2012 concerning the Social and Environmental Responsibility of Limited Liability Companies (hereinafter referred to as Government Regulation No. 47 of 2012).

However, even this Government Regulation No 47 of 2012 does not clearly stipulate the form of sanctions for companies that do not carry out their legal

⁵⁹ Paul A. Griffin, David Lont H., and Carol Pomare, 'The Curious Case of Canadian Corporate Emissions Valuation', *The British Accounting Review*, 53.1 (2021), 100922–100922 <https://doi.org/10.1016/j.bar.2020.100922>.

⁶⁰ K.F. Kuh, 'The Law of Climate Change Mitigation: An Overview', in *Encyclopedia of the Anthropocene* (Elsevier, 2018), pp. 505–10 <https://doi.org/10.1016/B978-0-12-809665-9.10027-8>.

⁶¹ Melanie Pill, 'Towards a Funding Mechanism for Loss and Damage from Climate Change Impacts', *Climate Risk Management*, 35 (2022), 100391–100391 <https://doi.org/10.1016/j.crm.2021.100391>.

⁶² Robbie M. Andrew, 'Towards near Real-Time, Monthly Fossil CO2 Emissions Estimates for the European Union with Current-Year Projections', *Atmospheric Pollution Research*, 12.12 (2021), 101229–101229 <https://doi.org/10.1016/j.apr.2021.101229>.

obligations to carry out CSR. Then, the Company Law does not explain in detail how the concept of CSR should be carried out by the Company. The existence of regulations regarding CSR in the Company Law and Government Regulation No. 47 of 2012 is feared to be in vain if they do not contain provisions regarding sanctions. This is because companies can neglect their responsibilities and have the potential to cause environmental damage. Therefore, climate change litigation is expected to fill the legal vacuum regarding the enforcement of human rights violations caused by negligent corporations or resulting in environmental damage that causes human rights violations against affected people.

4. Conclusion

The research shows that climate change lawsuits can be filed against corporations as defendant for their activities that contribute to climate change. The research also shows that human rights-based arguments can be used in climate change litigation cases against corporations in Indonesia due to the recognition of substantial and procedural rights in regulations. By utilizing a human rights-based approach and building on the lessons learned from landmark cases like *Milieudefensie v. Shell*, Indonesia can hold corporations accountable for their contribution to climate change and promote the reduction of GHG emissions. Climate change litigation in Indonesia can raise corporate awareness and reduce emissions. To be effective, a human rights-based approach that upholds the right to a safe environment is crucial. Courts must interpret human rights principles in line with environmental protection and recognize the connection between human rights and climate change. However, there are also various challenges, such as the uncertainty of procedural law and also the legal vacuum in imposing sanctions.

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