Climate Change as Human Rights Issue

will international mass tort actions against multinationals follow?

By Jack Castle

By its decision in *Vereniging Milieudefensie and others v Royal Dutch Shell* the Court of Appeal of The Hague found a duty on Royal Dutch Shell to cut emissions of the entire Shell group by 45% at end 2030, categorising climate change as a human rights issue and drawing on international principles relating to corporate social responsibility in the human rights field. This significant decision is potentially a sign of things to come in climate change litigation.

Introduction

1. In *Vereniging Milieudefensie and others v Royal Dutch Shell* (C/09/571932 / HA ZA 19-379) The Hague Court of Appeal found Royal Dutch Shell (RDS) has a duty to reduce the CO2 emissions of the entire Shell group by net 45% at end 2030 relative to 2019 through its corporate policy. This finding is based on tortious concepts, influenced by human rights and various soft law obligations.

2. The *Milieudefensie* group action is part of a growing series of cases in which claimants have sought to rely on human rights arguments in climate change litigation before national courts.

The decision in *Milieudefensie*

3. The Court found RDS liable on the basis of a concept in Dutch law, the 'unwritten standard of care'. In its interpretation of this unwritten standard of care the Court factored in the rights of Dutch residents and inhabitants of the Wadden region under Articles 2 and 8 of the ECHR and Articles 6 and 17 of the International Covenant on Civil and Political Rights (ICCPR).

4. In *State of the Netherlands v Urgenda Foundation* (20 December 2019, ECLI:NL:HR:2019:2006) the Dutch Supreme Court had already held that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to CO2 emissions. In *Milieudefensie*, the Court noted that the UN Human Rights Committee had decided similarly as regards the ICCPR. The Court explicitly dismissed RDS's argument that human rights offered no protection against climate change (at [4.4.10]).

5. The Court in *Milieudefensie* further noted that the UN Guiding Principles (UNGP) reflect current insights, in line with other, widely accepted soft law instruments such as the UN Global Compact principles and the OECD Guidelines for Multinational Enterprises. Since 2011 the European Commission has expected European businesses to meet their responsibilities to respect human rights as defined in the UNGP. The UNGP were therefore relevant as a guideline to the unwritten standard of care. The Court found that "*[d]ue to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website to support the UNGP*" (at [4.4.11]).

6. The Court held that "*it can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights […] Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts*" (at [4.4.14]–[4.4.15]).

7. The Court also noted RDS's own public statements on climate change and human rights, (appearing, *inter alia*, in its annual reports and on its website), and that its CEO has ultimate responsibility for the whole Shell group, including on climate-

related issues. Although the group corporate policy did mention climate change, it consisted of what the Court described as "*intangible, undefined and non-binding plans for the long-term (2050)*" which were insufficient, particularly set against concrete plans for new explorations.

8. The UNGP therefore placed on RDS a positive obligation to avoid causing adverse human rights impacts, and to seek to prevent or mitigate human rights impact linked to its operations. This encompassed its "business relationships" – whether with business partners or with companies within its own group (at [4.4.17]).

9. After considering the widely-endorsed scientific consensus that limiting global warming to 1.5°C requires a net reduction of 45% in global CO2 emissions in 2030 relative to 2010, and a net reduction of 100% in 2050, the Court found that RDS, in formulating corporate policy of the Shell group, should take as a guideline that the Shell group's CO2 emissions in 2030 must be net 45% lower relative to 2019 levels. It was left to RDS as to how to achieve this "reduction obligation". "*The not-disputed circumstance that RDS is not the only party responsible for tackling dangerous climate change in the Netherlands and the Wadden region does not absolve RDS of its individual partial responsibility to contribute to the fight against dangerous climate change according to its ability*" (at [4.4.37]).

Wider impacts?

10. The impact of the decision is already broad – a 45% reduction in Shell's global emissions by 2030. That climate change is metamorphosing into part of the human rights sphere may also have even wider effects.

11. First, climate change becoming a human rights issue will engage pre-existing enforcement mechanisms in soft law – notably through the OECD's Guidelines for Multinational Enterprises and the UN's Guiding Principles for Business.

12. Second, following a European Parliament vote in March 2021 and a broad public consultation, the Commission is expected to bring forward a legislative proposal in June for mandatory supply chain due diligence, including matters relevant to human rights breaches and environmental issues. This may include making the Commission's expectation that businesses follow the UNGP into a binding requirement. UK companies trading in the EU will not necessarily escape.

13. Third, public law challenges to the climate responsibilities of multinational business are already underway. Climate change being considered a human rights issue would trigger positive duties in domestic law to secure Article 2 and 8 rights, creating a new species of public law challenge in which multinational companies would clearly have an interest.

14. Fourth, the common law may evolve or take into account climate change as a human rights issue (through the horizontal influence of the HRA on tort development), along the lines of The Hague Court of Appeal. There may certainly be scope for further developments in the law of international mass tort claims in this jurisdiction. The ambitious claim in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 relating to the breaking up of ships in Bangladesh, for example, was put alternatively as an environmental case for jurisdiction purposes.

15. Further, given that claims in tort can be founded on acts committed within England and Wales even where the damage is sustained outside the jurisdiction (see 3.1(9) PD6B CPR) it can be seen how corporate decisions or acts in the UK might become actionable. For example, decisions taken at a multi-national's headquarters in the UK might be alleged to have led to environmental damage abroad (say an increase GHG emissions which have foreseeably caused the flooding of a community on low-lying land in the Global South). The Dutch Court has previously held RDS, as a parent company co-domiciled in the Netherlands, responsible for

oil spills in Nigeria, applying English law (as would be applied in Nigeria). A similar claim is pending here having been allowed to proceed by the Supreme Court in *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3. It can only be a matter of time before that same construct is applied to climate change-based damage abroad.

Jack Castle
1 June 2021