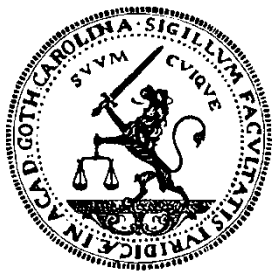

FACULTY OF LAW

Lund University

Els Heile

Can Human Rights Aid the "Super Wicked"?

The potential of the business and human rights regime to compel corporations to take climate action

JAMM07 Master Thesis

International Human Rights Law

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Table of Content

Summary

Climate change is considered a “super wicked” policy problem. The complexities of effective mitigation action and multicausality of the problem have hindered successful global governance. Therefore, the world is not on the course of achieving the goals of Paris Agreement to limit the increase of global warming to well-below 2 degrees compared to 1990 levels. Yet, States are not holding each other accountable for a failure to do their part in a global crisis.

The acute crisis has mobilised bottom-up legal action. An increasing number of countries and corporations are being sued for their inadequate action to achieve ambitious emission reduction levels. However, the complexities that make climate change a “super wicked” policy problem are also challenging access to remedy. Lately, international human rights law has become a valuable tool to overcome many of the challenges in climate change litigation against States. In fact, human rights obligations have facilitated the receival of forward-looking remedies that produce direct and indirect regulatory effects.

Although international human rights law traditionally imposes obligations only on States, the business and human rights regime has provided an opening for these arguments to be made also in relation to business conduct. This thesis analyses to what extent the business and human rights regime provides adequate remedies to compel corporations to take climate action. The analysis is based on the responsibilities of business entities that arise from the United Nations Guiding Principles on Business and Human Rights. The thesis focuses on the responsibility of corporations operating in the fossil fuel industry, namely Carbon Majors, and financial sector.

It is observed that the business and human rights regime is able to encompass climate change-related adverse human rights impacts by businesses. However, the tools to ensure respect that arise from the UN Guiding Principles impose challenges to prevent excessive contribution to global greenhouse gas emissions, unless a specific environmental or climate dimension is explicitly stated. Furthermore, the access to remedy that the regime envisages is mostly unsuitable for adverse impacts such as climate change in terms of establishing legal liability as well as achieving preventative remedy.

These observations are tested in relation to judicial and non-judicial remedy routes that the business and human rights regime envisages. The thesis remains sceptical about the success of replicating the regulatory success of strategic public climate litigation by bringing legal action against corporations. The thesis argues that it will be unlikely for national courts to attribute liability for climate-change related adverse impacts, due to the non-binding nature of the UN Guiding Principles and the uniqueness of climate change. Yet, some indirect effects may be conceivable. However, it will be noted that domestic obligations to respect human rights might provide a much more fruitful basis for accountability and preventative remedy. The non-judicial route to remedy is considered a more productive way to compel action from corporations, but also from States, particularly to incentivise States to regulate business conduct in a way that results in emissions reductions.

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I would like to sincerely thank my supervisor Matthew Scott for his guidance, interesting discussions and trust with this “super wicked” topic.

To the loveliest support team: Aitäh! Tack! Thank you! Dankjewel! Go Raibh maith agat! Grazie! Дякую! Tak!

Finally, to quote the most inspiring law student,

“We did it!”

(Elle Woods)

Abbreviations

ACHPR	African Court on Human and Peoples' Rights
CO2	Carbon dioxide
COP	Conference of the Parties
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRDD	Human rights due diligence
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
NCP	National Contact Point
NDC	Nationally Determined Contribution
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NJM	Non-judicial mechanism
OHCHR	Office of the United Nations High Commissioner for Human Rights
OECD	Organisation for Economic Co-operation and Development
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights
WHO	World Health Organisation
WIM	Warsaw International Mechanism for Loss and Damage associated with Climate Impacts

1. Introduction

1.1.Problem at issue: climate change as a human rights issue

Climate change is the defining crisis of our time and is unquestionably harmful for the life on the planet. There has been a continuous increase of global temperatures since 1850, precipitation has increased since 1901, glaciers are shrinking worldwide, and the oceanic uptake of carbon dioxide (CO2) has resulted in acidification of the ocean.[1] These adverse effects have significant adverse impacts on human systems: sea level rise will result in loss of land and lack of clean water resources and increased temperatures exacerbate the transmissions of diseases. Furthermore, extreme weather events will become the main cause of dislocation of populations and damages to essential infrastructure, and precipitation will cause outbreak of diseases and depletion of agricultural soils vital for food production.[2] These impacts clearly infringe on a wide range of human rights. Thus, climate change is becoming one of the greatest human rights challenges in need for urgent action.[3]

This thesis will embark on a discussion on how international human rights law can respond to this crisis and galvanise necessary action by relevant actors.

Climate change has initially been considered an environmental issue. However, for more than a decade, human rights treaty bodies have increasingly discussed the negative impacts climate change has on humans. One of the first steps towards the acknowledgment of climate change as a human rights issue at the United Nations (UN) level was the passing of UN Human Rights Council's resolution in 2008. The Human Rights Council recognised the negative impacts global warming has on human rights and requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct a study on the relationship between climate change and human rights.[4] The study outlined effects on specific rights[5] and on specific groups.[6] It also recognised the disproportionate effect of climate change on poorer regions that have the least responsibility for the human-induced climate change.[7] Human Rights Council's resolution in 2009 reaffirmed these findings as well as the unequal distribution of implications.[8] Furthermore, the more recent publications by UN treaty bodies have cemented the salience of climate change as one of the main human rights issues of our generation. For example, in the

[1] Intergovernmental Panel on Climate Change, 'Climate Change 2014: Synthesis Report' (Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 2014) 2–4.
[2] Center for International Environmental Law and CARE International, 'Climate Change: Tackling the Greatest Human Rights Challenge of Our Time' (2015) 4.
[3] Michelle Bachelet, '"Stepping up Government Leadership: From Commitments to Action": Opening Statement by Michelle Bachelet, UN High Commissioner for Human Rights' (2019).
[4] UN Human Rights Council, 'Resolution 7/23. Human Rights and Climate Change' (2008) UN Doc A/HRC/RES/7/23.
[5] Effects on right to life, right to adequate food, right to water, right to health and right to self-determination were outlined. UN Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (2009) UN Doc A/HRC/10/61 paras 20–41.
[6] Effects on women, children and indigenous peoples were outlined. ibid 42–54.
[7] ibid 10.
[8] UN Human Rights Council, 'Resolution 10/4. Human Rights and Climate Change' (2009) UN Doc A/HRC/RES/10/4.

General Comment No. 36, the UN Human Rights Committee stated that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability to present and future generations to enjoy the right to life".[9] Several other UN treaty bodies have similarly emphasised the adverse effects of climate change on human rights.[10]

Possibly the most comprehensive list of rights being dependent on a safe, clean, healthy and sustainable environment can be found in the Framework Principles on Human Rights and the Environment consolidated by the UN Special Rapporteur on Human Rights and the Environment.[11] These rights include the right to life and right to health (including both physical and mental health), right to an adequate standard of living, right to adequate food, right to safe drinking water and sanitation, right to housing, right to participation in cultural life, right to development, and right not to be forcefully displaced.[12] Moreover, the UN Special Rapporteur recognised that environmental degradation affects all human rights.[13]

The adverse impacts have regrettably already started to materialise. According to the UN Refugee Agency, nearly 25 million people in around 140 countries were displaced in 2019 due to extreme weather events.[14] Moreover, the World Health Organisation (WHO) estimated that air pollution resulting from and exacerbated by greenhouse gas emissions caused almost 12% of global deaths in 2012.[15] This was recently also recognised in a court ruling in which a London coroner held that air pollution has caused the death of nine-year-old Ella Kissi Debrah.[16] Such findings continuously demonstrate the interconnectedness of climate change and human rights, as well as an urgency to take action.

1.2.Climate governance: a "super wicked" policy problem

In a world consisting of sovereign individual States, transboundary challenges are addressed by negotiations and collaborative policy-making. However, these processes have been plagued with several difficulties. In fact, climate governance has been even called a "super wicked" policy problem.[17] The complexity and self-interest of the policy-makers, i.e. States, have complicated climate governance due to three main features. Firstly, climate change is not a

[9] UN Human Rights Committee, 'General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, Right to Life' (2018) UN Doc CCPR/C/GC/36 para 62.
[10] Committee on the Rights the Child, 'General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*' (2013) UN Doc CRC/C/CG/15; Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change' (2018) UN Doc CEDAW/C/CG/37.
[11] UN Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2018) UN Doc A/HRC/37/59.
[12] ibid 7, para 4.
[13] ibid 14, para 14.
[14] Tim Gaynor, 'Climate Change Is the Defining Crisis of Our Time and It Particularly Impacts the Displaced' (*UNHCR*, 30 November 2020) <https://tinyurl.com/35yhuvfr> accessed 25 April 2021.
[15] World Health Organisation, '7 Million Premature Deaths Annually Linked to Air Pollution' (25 March 2014) <https://www.who.int/mediacentre/news/releases/2014/air-pollution/en/> accessed 10 May 2021.
[16] Sandra Laville, 'Air Pollution a Cause in Girl's Death, Coroner Rules in Landmark Case' (*The Guardian*, 16 December 2020) <https://www.theguardian.com/environment/2020/dec/16/girls-death-contributed-to-by-air-pollution-coroner-rules-in-landmark-case> accessed 15 March 2021.
[17] Richard J Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 Cornell Law Review 1153.

static problem but is worsened with time. Failure to tackle global warming does not merely pass the responsibility to the next generation, but simultaneously adds to it. The present generations rapidly exacerbate the problem by increasing global greenhouse gas emissions at a significant rate.[18] Therefore, the complexity of counteraction increases over time.

Secondly, those who are primarily responsible for causing climate change and are usually best positioned to mitigate global warming and its effects. However, these actors have, for a long time, lacked incentives to act. Finally, the international community lacks an authority equipped with legal jurisdiction that could adequately respond to the global scope of the climate crisis.[19]

Nevertheless, steps have been taken to collectively address global environmental problems. The first global environmental conference in Stockholm in 1972 concluded with a Declaration in which the participating States confirmed the importance that healthy environment has for human rights.[20] Although a non-binding treaty, Principle 21 on the Stockholm Declaration has remained influential for the purpose of identifying and justifying the rights and duties of States.[21]

In 1992, Rio Declaration on Environment and Development was adopted, thereby ensuring the importance of the precautionary principle: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[22] Yet, similarly to the Principles adopted in Stockholm, Rio Declaration remained declaratory and non-binding.

Yet, at the same time, the UN Framework Convention on Climate Change (UNFCCC) was adopted with an aim to achieve "stabilisation of global greenhouse gas emissions in the atmosphere at a level that would prevent dangerous anthropogenic interferences with the climate system."[23] The efforts of UNFCCC are informed by the workings of the Intergovernmental Panel on Climate Change (IPCC). IPCC is a UN intergovernmental body that provides scientific information to policy-makers at all levels, thereby contributing to the development of climate policies.[24]

The UNFCCC was firstly operationalised by the Kyoto Protocol that was adopted in 1997; yet, only entered into force in 2005. It is important to note that the Kyoto Protocol imposed legally binding commitments only to industrialised countries, also referred to as Annex I countries.[25] Although global climate action has been the aim of UNFCCC since the beginning, the first

[18] Upendra Baxi, 'Towards a Climate Change Justice Theory?' (2016) 7 Journal of Human Rights and the Environment 7, 29.
[19] Lazarus (n 17).
[20] Stockholm Declaration on the Human Environment 1972, UN Doc. A/CONF.48/14, at 2 and Corr.1.
[21] Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12 Michigan Journal of International Law 420, 422.
[22] Rio Declaration on Environment and Development 1992, UN Doc. A/CONF.151/26 (Vol I) Principle 15.
[23] United Nations Framework Convention on Climate Change 1992, UN Doc. FCCC/INFORMAL/84, art 2.
[24] For more information, see 'The Intergovernmental Panel on Climate Change' <https://www.ipcc.ch/> accessed 10 May 2021.
[25] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (UN Doc FCCC/CP/1997/L7/Add1).

globally binding climate treaty – Paris Agreement – was adopted only in 2015. With the Paris Agreement, the international community aims to strengthen the global response to the threat of climate change by mitigation, adaptation and loss and damage actions.[26] These have become the three pillars of climate action. The State Parties commit to limiting global warming to "well below 2 degrees above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees above pre-industrial level".[27] These goals were directly informed by IPCC's Fourth and Fifth Assessment reports.[28]

For the purpose of mitigation, all State Parties to the Paris Agreement are required to undertake rapid emissions reductions to achieve the long-term temperature goal.[29] States must "prepare, communicate and maintain successful nationally determined contributions" (NDC) and "pursue domestic mitigation measures with the aim of achieving such objectives."[30]

Secondly, State Parties agreed to long-term adaptation goals – "increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production"[31] and "making finance flows consistent with the pathway towards low greenhouse gas emissions and climate-resilient development".[32] The third pillar of the UNFCCC climate action concerns the loss and damage that happens when both mitigation and adaptation measures fail.[33] By that, the Paris Agreement incorporates the Warsaw International Mechanism for Loss and Damage associated with Climate Impacts (WIM) established by the Conference of the Parties (COP) in 2013. The aim of this mechanism is to address the climate change-related losses and damages resulting from extreme weather events and slow onset events in climate vulnerable countries.[34]

Thus, Paris Agreement was an important moment for climate action. For the first time, clear objectives were established in reference to global temperatures. Yet, despite of the commitments, the world is far from achieving the goals of the Paris Agreement according to a report by world-class climate scientists in which they analysed the carbon emission reduction pledges of the 184 countries signed up to Paris Agreement.[35] The report revealed that the current emission reduction targets will not ensure that global warming is limited to 2 degrees above pre-industrial level, instead the global temperatures will increase by up to 4 degrees.[36] Even

[26] Paris Agreement (12 December 2015, entered in force 4 November 2016), U.N. Doc. FCCC/CP/2015/19, art 2.
[27] ibid, art 2(1)a.
[28] Carl-Friedrich Schleussner and others, 'Science and Policy Characteristics of the Paris Agreement Temperature Goal' (2016) 6 Nature Climate Change 827.
[29] Paris Agreement, art 4(1).
[30] ibid, art 4(2).
[31] ibid, art 2(1)b.
[32] ibid, art 2(1)c.
[33] ibid, art 8.
[34] 'Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM)' (*United Nations Climate Change*) <https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage-ld/warsaw-international-mechanism-for-loss-and-damage-associated-with-climate-change-impacts-wim> accessed 23 March 2021.
[35] Stephen Leahy, 'Most Countries Aren't Hitting 2030 Climate Goals, and Everyone Will Pay the Price' (*National Geographic*, 5 November 2019) <https://www.nationalgeographic.com/science/article/nations-miss-paris-targets-climate-driven-weather-events-cost-billions> accessed 30 April 2021.
[36] ibid.

after a year of Covid-19 that halted global economy and slowed down many high-emitting industries, it is estimated that in 2021 CO2 emissions are going to soar by the second biggest annual rise ever as countries are boosting their economies by pouring stimulus cash into fossil fuel industry.[37]

On a more positive note, the United States that is one of the biggest global emitters announced that they will cut emissions by 50% by 2030.[38] Also, in the last years, commitment to climate action has found more political support throughout the world.[39] Yet, the current situation clearly demonstrates that these developments are dependent on the political will of world leaders and lack enforcement mechanisms under the Paris Agreement. Although climate governance foresees some accountability measures, the enforcement and accountability mechanisms of the UNFCCC have been underused.[40] Therefore, it is even argued that the environmental law regime lacks sophisticated remedial mechanisms that would require States to take on responsibility for their inadequate emissions reductions.[41] Moreover, even if inaction was to be challenged, Paris Agreement only obliges countries to produce NDCs but does not prescribe a specific level of reduction that every country must achieve. The goal of limiting global warming to well-below 2 degrees is a global shared responsibility.

Although WIM could, at first instance, be considered a remedial compensatory mechanism, it is not designed for remedial purposes. Article 8 of the Paris Agreement that incorporates WIM into the climate action under the Agreement, explicitly denies its purpose as a basis for any liability or compensation.[42] This clearly indicates that States are reluctant to create mechanisms that would provide access to remedy for climate related harm or climate inaction.

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[37] United Nations Environment Programme, 'The Emissions Gap Report 2020' (2020).
Fiona Harvey, 'Carbon Emissions to Soar in 2021 by Second Highest Rate in History' (*The Guardian*, 20 April 2021) <https://www.theguardian.com/environment/2021/apr/20/carbon-emissions-to-soar-in-2021-by-second-highest-rate-in-history> accessed 25 April 2021.

[38] Oliver Milman, 'Biden Vows to Slash US Emissions by Half to Meet "Existential Crisis of Our Time"' (*The Guardian*, 22 April 2021) <https://www.theguardian.com/us-news/2021/apr/22/us-emissions-climate-crisis-2030-biden> accessed 30 April 2021.

[39] Christian Noel, Louis Blouin and Martin Laurence, 'Canada's New Climate Change Target Will Exceed 40% Cut in Emissions: Radio-Canada Sources' (*CBC News*, 21 April 2021) <https://www.cbc.ca/news/politics/ghg-emissions-target-reductions-1.5996400> accessed 10 May 2021; Gleb Stolyarov and Olesya Astakhova, 'Putin Calls for Russian Greenhouse Gas Emissions to Be Lower than EU's' (*Reuters*, 21 April 2021) <https://www.reuters.com/business/environment/putin-says-russias-greenhouse-gas-emissions-should-be-lower-than-eus-2021-04-21/#:~:text=Russia%20joined%20the%202015%20Paris,to%20carbon%20neutrality%20by%202050.> accessed 10 May 2021; Xiaoying You, 'China's 2060 Climate Pledge Is "Largely Consistent" with 1.5C Goal, Study Finds' (*Carbon Brief*, 22 April 2021) <https://www.carbonbrief.org/chinas-2060-climate-pledge-is-largely-consistent-with-1-5c-goal-study-finds#:~:text=China%20is%20the%20world's%20largest,30%25%20of%20the%20global%20total.&text=The%20cross%2Dmodel%20evaluation%20shows,%E2%80%9Cno%2Dpolicy%E2%80%9D%20scenario.> accessed 10 May 2021.

[40] Dispute settlement mechanisms are prescribed in United Nations Framework Convention on Climate Change, art 14.

[41] Sumudu A Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016) 267.

[42] Paris Agreement, art 8.

1.3.Climate change in international human rights law

Turning back to the human rights impacts of climate change, it is not unreasonable to ask whether international human rights law can assist in achieving emissions reductions. To what extent is climate change reflected in this regime?

In the preamble of Paris Agreement, the State Parties recognise the need to consider human rights when taking action to address climate change[43] but none of the binding provisions include a reference to human rights. It has been suggested that two pillars of climate action – adaptation and loss and damage – together could signal a commitment by the State Parties to safeguard the needs of the climate vulnerable as part of global climate governance.[44] Thus, Paris Agreement, to some extent, aligns climate change response with human rights and sustainable development.[45]

However, without binding human rights commitments, Paris Agreement cannot be considered an adequate standard for assessing the sufficiency of efforts to implement the objectives of the treaty.[46] The lack of references to human rights has even been considered a deliberate decision by the State Parties in order to avoid non-compliance with their international human rights obligations in case they fail to implement sufficient mitigation and adaptation policies.[47]

Can international human rights law incorporate a need for climate action without an explicit climate and human rights treaty? International human rights law does not include a universally accepted right to a safe, clean, healthy and sustainable environment that could directly enforce climate action. However, the right is included in the constitutions of around 100 countries and further 12 countries have explicitly recognised that the constitutional rights to life includes right to a healthy environment.[48] Regionally, the African Charter, San Salvador Protocol (Inter-American system) and the Aarhus Convention[49] in Europe include rights relevant to safe, clean and healthy environment.[50] Although not explicitly mentioned in the European Convention on Human Rights (ECHR),[51] the European Court of Human Rights (ECtHR) has recognised that

[43] ibid, preamble.
[44] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 45.
[45] ibid.
[46] Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 International and Comparative Law Quarterly 759, 769–770.
[47] Naomi Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) 1 Human Rights and the Environment 211, 226.
[48] David R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Cambridge University Press 2018).
[49] Aarhus Convention introduces procedural obligations, e.g. public participation and access to information, in regard to environmental matters. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998.
[50] African Charter on Human and Peoples' Rights 1981 (Organisation of African Unity CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) 1999; Aarhus Convention.
[51] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950 (Council of Europe ETS 5).

environmental degradation may affect the well-being of the individuals and give rise to violations of human rights.[52]

Despite of the increasing consensus on the existence of this right at the national and regional level, it has not resulted in a universal acceptance. Nevertheless, the above-mentioned UN Framework Principles concluded by the Special Rapporteur on Human Rights and the Environment analyse the human rights obligations that States already have in relation to safe, clean, healthy and sustainable environment.[53] Although not creating new human rights obligations, the Principles "reflect the application of existing human rights obligations in the environmental context".[54]

Interestingly, States are not the only actors addressed in these Framework Principles. The Special Rapporteur also referenced the responsibility of businesses to respect human rights from environmental harm.[55] This obligation arises from the UN Guiding Principles on Business and Human Rights (UNGPs).[56] The current Special Rapporteur on Human Rights and the Environment, David Boyd, has concluded a report on climate-specific human rights obligations.[57] In the Safe Climate report, human rights responsibilities of businesses were again highlighted.[58]

Hence, international human rights law consists of various obligations that are relevant for climate action, even in the absence of a specific climate change and human rights treaty and a universal right to safe, clean and healthy environment. Moreover, although climate action has been governed only at the supranational level between States, international human rights law articulates the responsibilities of other actors vis-à-vis human rights and climate change. Thus, human rights can be an important accountability tool.

Indeed, these obligations and responsibilities have recently become a powerful instrument to demand climate action. All around the world, there are attempts to use international human rights law to enforce forward-looking climate commitments. In fact, rights-based climate litigation has become a means to overcome the barriers that make climate change a "super wicked" policy problem. Being inspired by the potential of international human rights law, this thesis wishes to contribute to the development of rights-based climate litigation for the purpose of achieving emissions reductions.

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[52] *López Ostra v Spain* [1994] ECtHR App No 16798/90, para 51.
[53] UN Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (n 11).
[54] ibid 8.
[55] UN Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (n 11), Principle 12, para 35.
[56] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc A/HRC/17/31.
[57] UN General Assembly, 'Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment' (2019) UN Doc A/74/161.
[58] ibid 71–72.

The main debates and developments in scholarship discussing the rights-based climate litigation will now be outlined in order to situate this paper in the scholarly discussion and to illustrate which research gap the paper aims to fill.

1.4.Contribution to the research field

The coming together of human rights and climate discourse has resulted in the 'rights turn' in climate change litigation.[59] A recent Master's thesis at Lund University analysed the human rights turn in public climate change litigation in relation to mitigation-related demands and identified a potential shift from voluntary mitigation targets to court-ordered mitigation.[60]

In fact, most of the case law analysis and the role of human rights law has so far mostly focused on States and their obligations vis-à-vis climate change-related human rights harm.[61] Yet, States are not the only big emitters of greenhouse gas emissions as was confirmed in the Heede report published by the Climate Accountability Institute.[62] Therefore, increasing attention is also paid on private sector actors' responsibilities, particularly the fossil fuel industry, but also financial institutions as they play a crucial role in enabling the industry to flourish. In fact, as was said, part of the Paris Agreement commitments is to ensure that financial flows are consistent with the pathway to low carbon economy. The thesis will, therefore, focus on these two types of commercial actors.

The human rights responsibilities that could inform the climate obligations of private enterprises arise from the business and human rights regime which is guided by the UNGPs. Previous research has mostly focused on the connection between climate change and due diligence obligations that arise from the UNGPs.[63] For instance, Chiara Macchi has made a case to show that the corporate responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights also includes a climate change dimension. Thus, Macchi argues that corporations have a clear human rights responsibility to mitigate.[64] However, there is a considerable uncertainty on whether these climate change-related

[59] Peel and Osofsky (n 44).
[60] Kim C de Bruijn, 'A Paradigm Shift from Voluntary to Court-Ordered Climate Change Mitigation? The Potentials and Challenges of a Human Rights-Based Approach' (Master's Thesis, Lund University 2020).
[61] For example: Emily Barritt and Boitumelo Sediti, 'The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South' (2019) 30 King's Law Journal 203; KJ de Graaf and JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law 517; Chaitanya Motupalli, 'Intergenerational Justice, Environmental Law, and Restorative Justice' (2018) 8 Washington Journal of Environmental Law & Policy 333.
[62] Richard Heede, 'Carbon Majors: Accounting for Carbon and Methane Emissions 1854-2010: Methods & Results Report' (Climate Mitigation Services 2014).
[63] Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2020) Business and Human Rights Journal 1; Kristian Høyer Toft, 'Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology' (2020) 5 Business and Human Rights Journal 1; Sara L Seck, 'Business Responsibilities for Human Rights and Climate Change - A Contribution to the Work of the Study Group on Business and Human Rights of the International Law Association' (2017) SSRN Electronic Journal; Sara L Seck, 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty' (2017) 26 Transnational Law and Contemporary Problems 383.
[64] Macchi (n 63).

responsibilities give room to invoke remedial responsibilities.[65] Tara Van Ho has recently elaborated on the content of remedial responsibility more generally,[66] but did not shown the applicability of her theory to climate change-related human rights impacts. Therefore, it is currently uncertain whether the 'rights turn' could be replicated in private litigation.

Moreover, the research on the 'rights turn' has mainly focused on traditional litigation. However, the business and human rights regime includes other types of remedy mechanisms, namely non-judicial avenues. The role of non-judicial remedy mechanisms and the extent to which they are an effective remedy mechanism for traditional human rights violations happening across supply chains has been analysed previously.[67] It has been suggested that non-judicial routes are well suited for areas in which legal norms are not solidified.[68] Human rights-based climate action is one of such situations; however, the appropriateness of non-judicial routes has not been extensively explored, partly due to the limited number of such complaints.

Lastly, regarding available remedies, the human rights remedies that States should provide for climate change-related harm have been outlined.[69] Also, the remedial challenges for loss and damage have been discussed.[70] However, these forms of remedies have not been comprehensively discussed in relation to harm by businesses, especially in relation to climate change.

1.5.Research question and outline

In light of these scholarly developments and debates, this thesis will analyse the utility of human rights framework in relation to the following research question:

To what extent does the business and human rights regime provide adequate remedies to compel corporations to take climate action?

In order to give a well-rounded answer, the chapters will explore these additional sub-questions:

- Chapter II will explore what are the advantages that human rights arguments provide for climate change litigation. The aim of the second chapter is to outline the broad

[65] Tara Van Ho, 'Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights' (2021) 43 Human Rights Quarterly 2 <http://repository.essex.ac.uk/28638/> accessed 25 April 2021..
[66] Van Ho (n 65).
[67] For example: May Miller-Dawkins, Kate Macdonald and Shelley Marshall, 'Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms' (2016); Scheltema, Martijn, 'Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Grievance Mechanisms' (2014) Dovenschmidt Quarterly 190; Benjamin Thompson, 'Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach' (2017) 2 Business and Human Rights Journal 55.
[68] Mariëtte Van Huijstee and Joseph Wilde-Ramsing, 'Remedy Is the Reason: Non-Judicial Grievance Mechanisms and Access to Remedy' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Limited 2020).
[69] For example: Maxine Burkett, 'Climate Reparations' (2009) 10 Melbourne Journal of International Law 509; Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 Climate Law 224.
[70] Meinhard Doelle and Sara Seck, 'Loss & Damage from Climate Change: From Concept to Remedy?' (2020) 20 Climate Policy 669; Ivo Wallimann-Helmer and others, 'The Ethical Challenges in the Context of Climate Loss and Damage' in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change* (Springer International Publishing 2019).

narrative of the 'rights turn'. This will inform the evaluation of the business and human rights regime's potential.

- Chapter III will delve into the notion of corporate responsibility to respect human rights. The aim of the chapter is to answer the following question: To what extent does the business and human rights regime include obligations to mitigate and remedy climate change-related impacts? The third chapter will establish the particularities of the regime that are relevant to answer the main research question, as well as for the analysis in the last two chapters.
- Chapter IV will attempt to answer the question, what are the limits and opportunities of judicial avenues to achieve climate action by corporations. It will be analysed whether the successes of the 'rights turn' outlined in the second chapter can be replicated within the business and human rights regime.
- Chapter V is dedicated to the limits and opportunities of State-based non-judicial avenues of remedy. The chapter will explore whether these remedy mechanisms are better equipped and positioned to compel corporations to take ambitious climate actions.

1.6.Research methods, analytical tools and materials

To answer the research question, the thesis will undertake a critical analysis of the business and human rights regime. More particularly, the thesis will analyse the value of the regime in ensuring adequate remedy; therefore, an outcome-focused approach will be applied. This is in line with the notion of 'principled pragmatism' that is the position from which business and human rights regime operates.[71] Principled pragmatism is "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people."[72]

In the context of climate change, the desired change that this thesis focuses on is the reduction of greenhouse gas emissions by corporations. To analyse the potential of the business and human rights regime to contribute to this change by means of rights-based climate litigation, the thesis will assess the outcomes of litigation according to the analytical framework developed by scholars Jacqueline Peel and Hari Osofsky.[73]

Peel and Osofsky have identified potential pathways and effects of strategic litigation. They argue that litigation does not merely function as law enforcement but can also be a regulatory tool.[74] More particularly, litigation can result in direct regulatory effect or indirect regulatory effect. The former includes formal changes in either law or policy[75] that could be achieved by

[71] UN Office of the High Commissioner for Human Rights, 'Principled Pragmatism - the Way Forward for Business and Human Rights' (7 June 2010) <https://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx> accessed 10 May 2021.
[72] UN Commission on Human Rights, 'PROMOTION AND PROTECTION OF HUMAN RIGHTS.' (2006) Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises∗ UN Doc E/CN.4/2006/97 para 81.
[73] Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015).
[74] ibid 29.
[75] ibid 37.

bringing a constitutional law claim, statutory interpretation case, or a lawsuit regarding common law obligations relating to nuisance, negligence or public trust.[76] In relation to mitigation, these direct impacts can, for example, include enforcement of emissions reduction commitments by invoking international or constitutional obligations, or clarifying and interpreting the connection between existing legal obligations and climate change.

The second potential pathway of strategic litigation – indirect regulatory effect – intends to change the behaviours and norms that influence the choices of main actors.[77] It is estimated that litigation can be an incentive for regulatory change that needs to be taken by corporations, individuals, or even the government.[78] These indirect effects result from either a substantial increase in costs that relates to a specific behaviour (e.g. release of greenhouse gas emissions) or growing reputational risks.[79] Likewise, litigation has a potential to raise public awareness and shift public opinions, or change social norms. These contextual changes may compel corporations, governments to (self-)regulate.[80]

Some of the potential effects for climate action through the 'rights turn' in litigation will be highlighted in the second chapter. The cases discussed are illustrative of the potential of international human rights law. The case of *Urgenda Foundation v the Netherlands* was chosen for the basis of the analysis as the first successful climate case that relied on human rights law to establish tort liability.[81] The case of *Youth for Climate Justice* will be discussed by virtue of the innovative remedial demand and development of the *Urgenda* judgment. However, the aim of the chapter is not to provide a comprehensive case law analysis, especially as the focus of the thesis is on the business and human rights regime.

The cases that will be analysed in the fourth chapter were chosen from the Climate Change Litigation Database that is operated by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter.[82] The case of *Smith v Fonterra* was chosen to illustrate the current situation of tort liability for climate change-related impacts. It is, knowingly, the only mitigation-related case in which a court has recognised a potential for a new novel duty of care that could encompass climate change-related impacts. The two other lawsuits that will be discussed in chapter IV, *Milieudefensie v Shell* and *Notre Affaire à Tous v Total*, are the only mitigation related lawsuits that explicitly rely on human rights law.

The relevant mitigation-related complaints of the fifth chapter were identified through the database managed by the OECD Watch, a global network dedicated to the promotion the OECD Guidelines for Multinational Enterprises and its grievance mechanisms.[83] The potential value

[76] ibid 45.
[77] ibid 47.
[78] ibid.
[79] ibid 48.
[80] ibid 47.
[81] Jolene Lin, 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)' (2015) 5 Climate Law 65.
[82] Sabin Center for Climate Change Law, 'Climate Change Litigation Databases' <http://climatecasechart.com/climate-change-litigation/> accessed 10 May 2021.
[83] OECD Watch, 'Complaints Database' <https://www.oecdwatch.org/complaints-database/> accessed 20 May 2021.

of the cases and complaints to assist in climate action is evaluated according to the analytical framework developed by Peel and Osofsky.

1.7.Delimitations

The international community has not yet failed to reach the climate commitments set out in the Paris Agreement; however, the urgency to take action is great. Therefore, the thesis will focus on the first pillar of the climate action, namely mitigation. Adaptation or loss and damage related caselaw demanding compensatory relief or adoption of adaptation plans will fall outside the scope of the thesis.

Preventative climate action can take a form of legal action that aims to stop a construction of a project that could result in a significant increase of greenhouse gas emissions.[84] However, such cases will not be discussed since the aim of the thesis is to compel corporations to commit to emission reductions that would assist in moving closer to carbon neutrality, not merely to prevent an increase of emissions.

The thesis will only focus on the corporations operating in the fossil fuel industry and financial sector due to their unique role and contribution to climate change. Moreover, these two sectors are explicitly addressed in international human rights law's efforts to address climate change.[85]

When analysing the potential of non-judicial mechanisms in chapter V, only State-based remedy mechanisms will be discussed as only State-based mechanisms can articulate the need for regulatory action at the State level, and demonstrate the greatest potential of non-judicial mechanisms. Operational-level mechanisms concern impacts of specific business projects that are not suitable for climate change due to the unique characteristics of the phenomenon.

[84] *Carballo et al v MSU SA, UGEN SA, & General Electric* [2017] Federal Court of Azul; *OAAA v Araucaria Energy SA* [2017] Federal Court of Mercedes; *Hahn et al v APR Energy SRL* [2017] Federal Court of Campane; *FOMEO v MSU SA, Rio Energy SA, & General Electric* [2017] Federal Court of San Nicolas.
[85] Expert Group on Global Climate Obligations, 'Oslo Principles on Global Climate Change Obligations' (2015).

2. ‘Rights Turn’ in Climate Litigation

The growing urgency to achieve significant improvements, as well as perceived inadequacy of the political processes have turned the attention to the possibility to demand accountability for climate change.[86] Since 1986, nearly 1600 climate cases have been identified, mostly in the United States but more recently, there has been an increase of cases in other regions.[87]

Pursual of remedy and the resulting liability aims traditionally at compensation or at prevention.[88] The former provides a direct redress to victims of harm. In the context of climate change, compensatory demands might be made in cases of materialised harm. For instance, in cases of damaged property or flooded land.[89] However, these liability aims relate to the adaptation and loss and damage pillars of the UNFCCC’s climate action which is not the focus of this thesis. Thus, the role of pursual of remedy and resulting effects will be analysed in relation to the second aim of liability action, namely prevention of harm.[90] In fact, there is an evident jurisprudential trend aiming at reduction of greenhouse gas emissions by changing the behaviour of major greenhouse gas emitters.[91] These climate cases that can be grouped under the term ‘strategic climate litigation’ because of their aim to achieve broader regulatory changes that would affect more people than only the applicants of the particular case.[92]

Based on these potential effects of strategic litigation that Peel and Osofky’s analytical framework has identified, it can be concluded that if such cases are brought to courtrooms for the purpose of climate action, climate litigation would be able to achieve similar outcomes as does climate change governance has aimed at, namely reduction of emissions.[93] As one plaintiff in a climate change-related lawsuit put it, “The ultimate goal of almost all litigation towards climate justice is to establish a global political responsibility that makes such lawsuits unnecessary”.[94] This chapter will analyse to what extent this can be achieved and what is the role of international human rights law in achieving regulatory effects. For this purpose, the main challenges of climate change-related litigation will be outlined first. Subsequently, the value of rights-based arguments will be analysed. Lastly, the chapter will pinpoint the potential direct and indirect regulatory effects.

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[86] Jutta Brunnée and others, ‘Introduction’ in Lord QC, Richard and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012) 3–4.
[87] Joana Setzer and Rebecca Byrnes, ‘Global Trends in Climate Change Litigation: 2020 Snapshot’ (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2020) Policy report.
[88] Michael G Faure and Andre Nollkaemper, ‘International Liability as an Instrument to Prevent and Compensate for Climate Change’ (2007) 43 Stanford Journal of International Law 123, 139.
[89] *Luciano Lliuya v RWE AG* [2017] Essen Regional Court.
[90] Faure and Nollkaemper (n 88) 139.
[91] Setzer and Byrnes (n 87).
[92] Peel and Osofsky (n 73) ch 3.
[93] Brunnée and others (n 86) 4.
[94] Christoph Bals, ‘RWE Lawsuit: First Test Case in Europe to Clarify Responsibilities of Carbon Majors for Climate Change’ (*Germanwatch*, 8 November 2018) <https://germanwatch.org/en/15999> accessed 23 March 2021.

2.1.Access to environmental justice

Climate change is not only a "super wicked" policy problem for the purpose of setting up a preventative regime. The nature of the issue also limits and complicates access to justice, accountability and adequacy of the available remedy options. The reluctance to establish international accountability mechanisms under the international climate change governance system was already outlined in the previous chapter. However, since the impact of climate change on the enjoyment of human rights is widely recognised, the international human rights law regime could provide avenues for access to remedy for environmental harm. In fact, it has been argued that the international instruments under the UNFCCC (e.g. Stockholm Declaration, Rio Declaration and Paris Agreement) aim to facilitate the enforcement of international environmental law in national courts by making connections between sustainable environment and human rights protection. This could alleviate the accountability lacuna in environmental law.[95]

Indeed, international human rights regime has been able to accommodate claims related to environmental harm. The African Court on Human and Peoples' Rights (ACHPR) has found violations of several human rights in a case concerning a widespread oil pollution due to oil extraction in Ogoniland, Nigeria.[96] In 2020, the Inter-American Court of Human Rights (IACtHR) issued a judgment that concerned activities carried out on the lands of indigenous communities and that adversely affected the environment.[97] The IACtHR expanded the interpretation of the right to progressive development of economic, social, and cultural rights to conclude that the activities by other communities on the land of indigenous peoples resulted in adverse impacts on the environment.[98] The European Court of Human Rights (ECtHR) has recognised that environmental degradation may give rise to the breach of human rights obligations. For example, the ECtHR found a violation of the right to life in the Grand Chamber case of *Öneryildiz v Turkey*[99] well as in other Chamber cases.[100] Also, a violation of the right to private and family life has been found on numerous instances.[101] Therefore, even without an explicit right to clean, safe, healthy and sustainable environment, international human rights instruments have been engaged in providing remedy for environmental harm.

These cases, however, concern effects from environmental disasters or environmental degradation and not from climate change specifically. In fact, although often considered an environmental issue, climate change does not classify easily under environmental claims for

[95] Catherine Redgwell, 'Access to Environmental Justice' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 159.
[96] *Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights (CESR) v Nigeria* [2002] ACHPR 155/96.
[97] *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina* [2020] IACtHR.
[98] ibid.
[99] The case concerned a methane explosion at a municipal rubbish tip that killed thirty-nine people and destroyed many properties. The applicants argued that the State was responsible for these deaths due to the lack of preventative measures taken. *Öneryildiz v Turkey* [2004] ECtHR (GC) App No 48939/99.
[100] For example: *Budayeva and others v Russia* [2008] ECtHR App Nos 153339/02, 21166/02, 11673/02, 15343/02.
[101] For example: *López Ostra v Spain* (n 52); *Guerra and others v Italy* [1998] ECtHR App No 14967/89.

the purpose of liability, thereby complicating access to remedy possibilities as will be discussed in the following section.

2.2.Climate change as a unique environmental harm

To illustrate the uniqueness of climate-related claims, let us compare climate change to a classic environmental issue such as a marine oil spill.[102] In the case of an oil spill, the oil is polluting water and harming marine ecosystems. However, climate change is caused by greenhouse gas emissions that are not conventional pollutants.[103] In fact, the main greenhouse gas CO2 is even valuable for the ecosystems as it is vital for photosynthesis and thus, for the production of oxygen, whereas an oil spill does not benefit the living nature. Furthermore, unlike oil spills or any other environmental pollution, releasing greenhouse gas emissions is not prohibited. In fact, the global economy is literally and figuratively driven by such activities. Our energy, transportation and material demands depend on extraction, production and burning of fossil fuels and the consequential release of greenhouse gas emissions.

Secondly, compared to a marine oil spill, greenhouse gas emissions are not localised which results in a paradoxical effect. On the one hand, once released, every tonne of greenhouse gas emissions contributes to global climate change and could have an adverse impact thousands of kilometres from where the gases were released. On the other hand, the contribution of every tonne to global emissions is mostly insignificant.[104] Thus, the question of volume becomes a significant contestation point when proving causation and attributing legal responsibility. It will have to be decided in what circumstances do emissions become unlawful and warrant court-ordered reduction measures.

The last key difference between an oil spill and climate change concerns the timespan. In addition to not being a static problem, the greenhouse gas emissions have a long-term effect. Likewise, the effects of excessive greenhouse gas emissions do not realise instantly but with a time lag.[105] Although scientists can predict and model the effects of climate change, the exact time when these changes will be happening cannot be pinpointed. This is not the case when an oil spill occurs.

2.3.Liability challenges

These aspects clearly challenge establishing liability for climate change related harm through traditional remedy mechanisms since most accountability regimes are based on direct causal link between harm and an actor, and individual remedial responsibility.[106] As climate change is a harm caused by cumulative contributions of multiple emitters and affects the entire world population, although to a varying degree, it does not neatly fit into traditional liability schemes. Furthermore, the fact that greenhouse gas emissions result from legal activities even further

[102] One of the most famous ones being the Deepwater Horizon Oil spill caused by the Carbon Major BP in 2010.
[103] Jutta Brunnée and others, 'Overview of Legal Issues Relevant to Climate Change' in Richard Lord QC and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012) 26.
[104] ibid.
[105] ibid.
[106] Margaret Moore, 'Global Justice, Climate Change and Miller's Theory of Responsibility' (2008) 11 Critical Review of International Social and Political Philosophy 501, 501.

complicates accountability possibilities. As it is not illegal to emit, a link between another harm must be established.

This, however, raises questions of standing that are inherently dependent on the requirements of the legal system in which remedy is being sought after. Often liability regimes require proof of a 'particularised injury' which might become a barrier to establishing standing and achieving any remedy and regulatory effect. [107]

Furthermore, the fact that greenhouse gas emissions are delocalised complicates causality elements as proximity or tangible connection between the emitter and the occurring harm is difficult to prove.[108] Therefore, it is challenging for plaintiffs to even establish who can potentially be held accountable for climate change-related harm. Moreover, the main contributors to climate change are in the Global North, whereas the effects of climate change are most severely experienced in the Global South. Therefore, this remedy challenge becomes especially pertinent in light of limited extraterritorial obligations.

Even if an appropriate duty-bearer has been identified, establishing causation for the purpose of attribution of responsibility is incredibly complex. As said, every tonne of greenhouse gas emissions contributes to climate change; yet, it is not easily proven to what extent this ton has changed the course of climate change and whether, and to what degree, these changes are responsible for particular weather events that cause adverse human rights impacts. The evolving attribution science aims to answer these questions;[109] yet, litigants are not able to rely on these findings yet. Therefore, it will be important to discuss whether remedial responsibility can be based on different obligations or theories of responsibility other than direct outcomes and individual responsibility.

Furthermore, even under international human rights law, States are allowed a wide margin of appreciation to find a balance between the protection of individuals' human rights and providing welfare and satisfying the general interests of the community.[110] This complexity often warrants the 'political doctrine' or 'separation of powers' defence by emitters. Since regulation of greenhouse gas emissions is usually left to public arena, courts may be reluctant to order remedies that involve socio-economic policy making, unless these policies are already in place.

States would have the authority to create remedy mechanisms that would not pose highly complex challenges to access to remedy. However, there is clearly a lack of political will to establish adequate remedy mechanisms for climate related harm, or to be held accountable for the lack of sufficient climate action as was discussed in the first chapter. This can be partly explained by the nature of the "super wicked" problem – many of the actors are benefitting

[107] United Nations Environment Programme and Sabin Center for Climate Change Law, 'Status of Climate Change Litigation, a Global Review' (2017) 28.
[108] Brunnée and others (n 103) 26.
[109] Stephen Ornes, 'Explainer: What Is Attribution Science?' (*Science News for Students*, 30 July 2019) <https://www.sciencenewsforstudents.org/article/explainer-what-attribution-science#:~:text=attribution%20science%20A%20field%20of,heat%20or%20odd%20storm%20trajectories.> accessed 10 May 2021.
[110] A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613, 632.

from the release of greenhouse gas emissions and thus, have less incentives to act. Moreover, States are reluctant to recognise and agree to extraterritorial obligations, further complicating remedial demands.

Despite of all these complexities and challenges, the seriousness and urgency of tackling climate change has resulted in increasing climate change-related litigation. The most recent cases have proven the advantages of demanding climate action as part of the fulfilment of the emitter's human rights obligations. Between 2016 and May 2020, 36 lawsuits were launched against states for climate change-related human rights violations. Additionally, three legal proceedings and one investigation petition were brought against corporations also on human rights grounds. This is a significant increase of human rights-based cases since before 2015, only five such cases had been filed.[111]

This trend has been coined the 'rights turn' in climate change litigation.[112] The following section will highlight the potential of this rights turn to overcome or circumvent some of challenges just outlined, and to achieve regulatory change.

2.4. Human rights-based climate cases

The first ever climate-related complaint brought to a human rights body was the *Inuit petition* launched in 2005.[113] The petitioners claimed that climate change has adversely affected the Inuit's hunting practices, as well as travel and food preservation methods due to the unpredictability of weather conditions.[114] This was a significant petition. Not only was it a climate change-related complaint but the petitioners also requested forward-looking remedies. The petitioners asked the Inter-American Commission on Human Rights (IACHR) to recommend that the United States should adopt measures that would limit its greenhouse gas emissions, account for greenhouse gas emissions in the evaluation of major government actions, and establish and implement a plan to protect Inuit culture and resources.[115] The case was not admitted by the IACHR on the grounds that "the information provided does not enable us to determine whether the alleged facts tend to characterise a violation of rights protected by the American declaration".[116]

This earlier case illustrates some of the challenges mentioned above. The lack of proximity between the emitters and Inuit community obscured the necessary causal links. These could have been overcome if the Commission had been willing to cross-cut different disciplines and rely on scientific evidence.[117] However, the scientific uncertainties about the causes of climate change at that time resulted in the rejection of the claim. Fortunately, a robust scientific consensus has emerged about the cases and effects of climate change, thereby allowing for

[111] Setzer and Byrnes (n 87) 14.
[112] Peel and Osofsky (n 44).
[113] *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States* [2005] (IACHR).
[114] ibid.
[115] ibid 7.
[116] *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States* (n 113).
[117] Hari M Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2006) 31 American Indian Law Review 675, 689.

cases to proceed. Relying on a certain level of scientific certainty, litigants are more confident in articulating human rights arguments. Indeed, the international human rights obligations can substantiate constitutional or statutory interpretation pathways that Peel and Osofsky had identified. Furthermore, the arguments have also proven valuable for tackling some of the remaining challenges.

2.4.1. Establishing a duty to act

Firstly, human rights and constitutional rights have been useful for identifying the relevant actors who could be held accountable. For instance, the constitutional duty to protect the climate and achieve climate neutrality was confirmed by the German Constitutional Court in *Neubauer et al. v. Germany* in April 2021.[118] Yet, even without a constitutional protection of climate, international human rights law framework has assisted in establishing the duty of States vis-à-vis a global phenomenon such as climate change even without a direct liability regime for climate-related obligations. As explained above, the delocalised nature and complexity around determining the volume of wrongful emissions poses a challenge to the establishment of appropriate duty-bearers and demands for remedy.

For instance, in the case of *Urgenda Foundation v the Netherlands* (hereafter: *Urgenda*), the applicants argued that the State of Netherlands is not doing enough to prevent dangerous climate change based on their domestic duty of care obligations that were substantiated by human rights obligations to protect the right to life and the right to private and family life under article 2 and 8 of the ECHR respectively.[119] The government's defence relied on the aspect of volume and argued that the Netherlands did not have human rights obligations to reduce emissions since climate change is a global problem both in cause and scope.[120] Based on the interpretation of the human rights norms that require States to "take appropriate steps to safeguard the lives of those within its jurisdiction",[121] the Supreme Court decided that even though climate change is a global problem, the State of Netherlands has a duty to "do its part" in order to prevent dangerous climate change.[122]

A similar argument has been made in the application to the ECtHR by Portuguese children (hereafter: *Youth for Climate Justice*).[123] The applicants argue that the current mitigation measures of the Respondent States must be presumed to be inadequate for the purpose of complying with their Convention obligations.[124] They claim that in the context of climate change, the positive human rights obligations under art 2 and art 8 ECHR are also owed extraterritorially.[125] As mentioned, for the purpose of liability, extraterritorial obligations of

[118] *Neubauer et al v Germany* [2021] Federal Constitutional Court of Germany 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.
[119] The applicants argued that "the emissions of the Netherlands are excessive and unlawful as they violate the due care required under Dutch law as well as under the ECHR art 2 and art 8". *Urgenda Foundation v The Netherlands* [2019] Supreme Court of the Netherlands ECLI:NL:HR:2019:2006, paras 2.2.1-2.2.2.
[120] ibid para 5.1.
[121] The positive obligations required for the prevention of environmental harm under art 2 and art 8 ECHR were deemed to largely overlap. ibid paras 5.2.2-5.2.4.
[122] ibid para 5.7.1.
[123] *Cláudia Duarte Agostinho et al v Portugal and 32 other States* (application) [2020] European Court of Human Rights 39371/20.
[124] ibid, annex para 27.
[125] ibid, annex para 16.

States have not been confirmed. However, the applicants of the *Youth for Climate Justice* invoked human rights law principles and obligations to build the argument for extraterritorial duties in the context of climate change. For instance, the applicants cited a well-known international principle established in *Loizidou v Turkey*: "Acts which are "performed within […] national boundaries [but] which produce effects outside" those boundaries may give rise to jurisdiction in certain circumstances".[126] The applicants also listed seven features that have made the ECtHR conclude that a State has extraterritorial jurisdiction even without exercising authority or having effective control over an area,[127] and argued that these factors were present in their claim.[128]

The *Youth for Climate Justice* case has not been adjudicated by the ECtHR yet, but the potential of human rights obligations being the basis of extraterritorial obligations was also confirmed in a landmark Advisory Opinion by the IACtHR on states' obligations in relation to human rights and the environment.[129] The Advisory Opinion highlighted the obligations that States have for the purpose of ensuring the enjoyment of human rights in relation to environmental protection, confirming the interconnectedness of human rights and the environment.[130] Relevant for the current discussion is the conclusion IACtHR made concerning the prevention of harms arising from cross-border environmental damage. The Court concluded that such harm warrants State's extraterritorial obligations to avoid such harm that can adversely affect the rights of individuals outside their territory.[131] Essential for climate change-related harm was the statement that the obligation to refrain from causing harm "does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction".[132]

Therefore, human rights arguments have potential to establish liability for climate change-related harm both at the national level, as held in *Urgenda,* and extraterritorially, as being argued in the application of *Youth for Climate Justice*.

2.4.2. Causation and attribution

As explained, causality was one of the main problems in the *Inuit petition.* Fortunately, the connection between human rights and climate change has become clearer now. Since the petition, a robust scientific consensus about the causes of climate change has emerged, especially based on the fourth and fifth assessment report of the IPCCC. The latest report confirms that climate change is caused by human-induced greenhouse gas emissions, and stated that it is extremely likely that the future emissions will cause further warming.[133] Also, the

[126] ibid, annex para 17.
[127] ibid, annex para 18.
[128] ibid, annex para 29.
[129] IACtHR, 'Advisory Opinion: The Environment and Human Rights' (2017) OC-23/17.
[130] ibid.
[131] ibid 101.
[132] ibid 103.
[133] Intergovernmental Panel on Climate Change (n 1).

report includes climate models projecting the trajectory of the effects of climate change at the current emission levels.[134]

These IPCC assessment reports have played a key role in many climate cases. For instance, in the case of *Urgenda,* the Supreme Court of the Netherlands substantiated the positive human rights obligations arising from art 2 and art 8 of the ECHR with the emissions reductions indicated in the IPCC reports.[135] Similarly, in the case of *Juliana et al. v the United States* (hereafter: *Juliana*)[136] in which 21 young plaintiffs claimed that the federal government of the United States is infringing on the plaintiffs' constitutional rights by causing dangerous climate change. The Ninth Circuit Court of the US accepted the scientific evidence and did not question the existence, causes and effects of climate change.[137]

Therefore, the scientific developments have allowed to overcome some aspects of the causation challenge. Yet, the question has now shifted from causation to attribution. The delocalised nature of the harm and the multitude of emitters makes it rather impossible to isolate individual emitting entities and attribute harm caused by climate change to a specific actor.[138] For the purpose of establishing liability, it has not been possible to prove that "particular greenhouse gas emissions relate causally to particular adverse climate change impacts"[139] due to the current limitations of attribution science. This illustrates the challenge posed by the nature of the liability regimes that only provide limited opportunities for shared responsibility.

Plaintiffs have suggested different theories how to overcome the difficulty of attribution. One of such theories resembles the "market share" theory: the apportion of responsibility depends on the "market share" of carbon emissions that particular emitter is responsible for.[140] However, this allocation theory has not been implemented successfully in a climate change-related case in any court so far.[141] Also, this type of theory fits to quantifiable harm and more to adaptation or loss and damage cases.[142] Therefore, it is difficult to apply the market share theory to mitigation related cases as future harms cannot be quantified.

Instead, human rights arguments might be able to assist here. Although human rights law is struggling to deal with multicausality, there is a possibility to compel individual action by relying on the obligation to take appropriate steps to prevent harm.

For instance, in the case of *Urgenda,* when answering the question whether the international human rights obligations that the Netherlands is bound by also warrant obligations in relation to climate change that are caused by cumulative global emissions,[143] the Court reiterated the individual responsibility to "do its part". Human rights played a specific role in the

[134] ibid.
[135] *Urgenda Foundation v The Netherlands* (n 119) paras 6.1-7.3.6.
[136] *Juliana v United States* [2020] United States Court of Appeals for the Ninth Circuit No. 18-36082.
[137] ibid.
[138] Lydia Akinyi Omuko, 'Applying the Precautionary Principle to Address the "Proof Problem" in Climate Change Litigation' (2016) 21 Tilburg Law Review 52, 54.
[139] United Nations Environment Programme and Sabin Center for Climate Change Law (n 107) 20.
[140] ibid 22.
[141] ibid.
[142] David Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (2019) 25 Australian Journal of Human Rights 428.
[143] *Urgenda Foundation v The Netherlands* (n 119) para 5.6.3.

determination since the Court substantiated the "do its part" obligations by looking at the positive obligations of the States under the Convention. The Court stated that the risk of climate change warrants the Contracting States to counter the danger based on the positive obligations they are bound by under art 2 and 8 of ECHR. Namely, in the case of possible serious damage to the environment, States must take adequate measures for the protection of individuals.[144] This is also in line with the precautionary principle under international environmental law. The Court further stated that these environmental human right obligations are not owed to a specific person but to the entire society.[145] Based on these obligations, the Court concluded that "the Netherlands must take adequate measures to reduce greenhouse gas emissions from the Dutch territory." [146] Therefore, human rights law arguments together with the precautionary principle have significant relevance in a situation when attribution science cannot assist in proving the causal link between emissions and the occurring or potential harm.

Reliance on human rights obligations also meant that the government was not able to rebut their duties by arguing that the share of emissions released from the Dutch soil are insignificant on a global scale and thus, the reduction would not have necessary effect.[147] Likewise, the Court of Appeal had previously also disagreed with the 'waterbed effect' argument, i.e. emission reductions by the Netherlands allow other European Union (EU) (or Annex I countries) to emit more, thereby nullifying the mitigation effect.[148] The government also suggested that the emission reduction target of 25-40% is not individual but applies to Annex I countries as a group.[149] The Court did not agree with that argument and concluded that each State is responsible for their own emissions.[150] Hence, it can be concluded that according to the Supreme Court of the Netherlands, human rights obligations require each States to "do its part" regardless of their initial volume of contribution to greenhouse gas emissions, or the acts or omissions of other States.

In *Youth for Climate Justice*, the applicants are somewhat addressing the shared responsibility and multicausality elements. However, although the complaint concerns 33 States, the applicants argue that they all are responsible for preventing climate change; yet, the action does not need to be shared, but each State has individual responsibility to act under international human rights law. In this way, the applicants rely on the line of argumentation in *Urgenda.* They add to the causation argument by claiming that the jurisprudence of the ECtHR does not require a "but for" test for causation. Instead, a "breach is found in the absence of proven causation where reasonable preventive measures were available and not taken".[151] This argumentation aims to situate *Urgenda'*s ruling to the jurisprudence of the ECtHR and asks the Strasbourg Court to disregard the lack of attribution measures as the State Parties are bound by

[144] ibid paras 5.2.2-5.2.4.
[145] ibid para 5.3.1.
[146] ibid para 6.1.
[147] ibid para 5.7.7.
[148] ibid para 2.3.2.
[149] ibid para 7.3.1.
[150] ibid para 7.3.6.
[151] *Cláudia Duarte Agostinho et al. v Portugal and 32 other States* (n 123), annex para 9.

these procedural obligations to take preventative measures regardless of these scientific challenges or the insignificant amount of individual emissions.

2.4.3. Preventative remedy

Peel and Osofsky have suggested that human rights lens in climate cases assists in developing proactive strategies that pre-empt the harm.[152] The aims of the rights-based climate cases have indeed been to achieve future-looking emissions reductions that could achieve direct regulatory effect. For instance, in *Urgenda,* the applicants requested the Court to order an injunctive relief demanding the government to reduce emissions.[153] The Netherlands as an Annex I country had committed to reducing emissions by 25-40% by 2020 compared to 1990 levels. The Supreme Court claimed that this level of emissions reduction enjoys a high degree of international consensus as suitable to prevent dangerous climate change that would infringe on the art 2 and art 8 rights of the residents of the Netherlands. Therefore, the Court ordered the government to achieve this target in order to comply with their duty of care and human rights obligations.[154]

New emissions reduction targets were also requested in the constitutional rights-based cases of *Neubauer*[155] and in *Juliana* in which the plaintiffs requested the Court to order the government to implement a plan that would phase out greenhouse gas emissions from fossil fuels and decrease excess carbon dioxide in the atmosphere was sought after.[156]

Although the applicants of *Youth for Climate Justice* did not argue that volume of emissions is the basis of attributing responsibility because human rights obligations warrant preventative measures regardless of the cause of the harm, the question of volume became relevant for the purpose of distributing remedial demands between the 33 countries. Having argued that the current emission reduction measures of the Respondent States were inadequate,[157] the applicants proposed that to determine the adequacy of measures and decide the reduction targets, the measures can only be evaluated in relation to the "'fair share' of the global burden of mitigating climate change".[158] Therefore, the absolute volumes of contribution were not relevant but the relative volumes should rather be measured in proportion to the contribution. The applicants clearly claim that under human rights law, every States has an obligation to do their part. Although there is no globally agreed methodology to determine the 'fair share' proportions, the litigants called on the Court to rely on the approach taken by the Climate Action Tracker.[159]

Without analysing the viability of the remedial demands of the *Youth for Climate Justice* application, it is still important to note that the idea of 'fair share' and 'shared responsibility' relies on the fact that all States have human rights obligations. Therefore, it could be concluded that the remedy that these cases are seeking after is for the courts to enforce either constitutional or human rights obligations to protect. The meaning of protection is substantiated by scientific standards.

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[152] Peel and Osofsky (n 44) 46.
[153] *Urgenda Foundation v The Netherlands* (n 119).
[154] ibid.
[155] *Neubauer et al. v Germany* (n 118).
[156] *Juliana v United States* (n 136).
[157] *Cláudia Duarte Agostinho et al. v Portugal and 32 other States* (n 123, para 27).
[158] ibid, para 29.
[159] ibid, para 31.

2.4.4. Direct and indirect effects

The rights-based cases have been successful in achieving both direct and indirect regulatory effects. For instance, the German government announced a day after the *Neubauer et al. v Germany* verdict that they will adjust their climate laws accordingly.[160]

Also, the case of *Urgenda* is a clear example of how human rights arguments were the basis for enforcing preventative action, thereby resulting in direct regulatory effect, namely ordering a change of climate policies. Interestingly, human rights arguments assisted in even overcoming political doctrine defence. In their defence, the government stated: "It is not for the Courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions".[161] These justiciability arguments of defence were rejected by the Supreme Court by relying on States' human rights obligations. The Court stated that "the State has a legal duty by virtue of the protection it must provide to residents of the Netherlands on the basis of articles 2 and 8 ECHR".[162] Therefore, the fundamental rules of constitutional democracy allow the Court to order the State to comply with its constitutional duties.[163] However, the Supreme Court recognised that it does not have the mandate "to issue an order to create legislation with a particular, specific content",[164] but can order the State to take specific legislative measures to fulfil a duty if the choice of the measures if left to the other branches of government.[165] Thus, direct effects have been possible due to the existing international or constitutional obligation to take active measures to prevent environmental harm .

However, not all of the rights-based cases have succeeded or might not succeed. For instance, the case of *Juliana* was dismissed due to the notion of separation of powers. The Ninth Circuit Court decided it was not in their mandate to order the requested remedial plan as it required significant political and economic decision-making and supervision of the plan. These tasks were found to belong to the mandate of the political branches.[166] Also, some cases are dismissed on jurisdiction-specific requirements. While the legal system of the Netherlands allows for *actio popularis,* there are many countries that do not. Therefore, standing might already be an issue from the beginning. For instance, the case of *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and others* was dismissed due to lack of standing.[167] The Federal Administrative Court claimed that women over 75 years that the applicants claimed to represent will not suffer from a particularised harm due to climate change.[168]

Nevertheless, the potential for indirect effect and normative value of both successful as well as unsuccessful cases should also not be underrated. The illustrations of the adverse human rights impacts of climate change on human rights, that are articulated in these cases, correspond with

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[160] 'Germany Pledges to Adjust Climate Law after Court Verdict' (*AP news*, 30 April 2021) <https://apnews.com/article/germany-europe-climate-climate-change-environment-and-nature-191b8ffca5ba6994ebd402b04432e6c8> accessed 10 May 2021.
[161] *Urgenda Foundation v The Netherlands* (n 119) para 8.1.
[162] ibid para 8.2.2.
[163] ibid paras 8.2.1-8.2.2.
[164] ibid para 8.2.6.
[165] ibid para 8.2.7.
[166] *Juliana v United States* (n 136).
[167] *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and others* [2018] Federal Administrative Court of Switzerland A-2992/2017.
[168] ibid.

the predictions that IPCC has made in its assessment reports. For instance, the applicants of *Youth for Climate Justice* described how the increased temperatures have already limited their ability to exercise and spend time outside, as well as reduced their energy levels.[169] Also, the fire risks that result from heatwaves have had adverse effects on their mental and physical health and has stopped them from going to school.[170] These described experiences directly depict the effects that IPCC reports have predicted.[171] Thus, human rights arguments are able to raise awareness about the human consequences that might change public opinion about States' actions. This is a powerful way to incentivise regulatory action and to enforce existing obligations.[172] For instance, the case of *Youth for Climate Justice* is aiming to clarify the connection between States' human rights obligations under art 2 and art 8 of the ECHR and other international instruments, such as the Paris Agreement and the UNFCCC as well as the UN Convention on the Rights of the Child.[173]

Furthermore, these actions and clarifications by authoritative human rights bodies can become a basis for a transnational climate change jurisprudence,[174] thereby filling the accountability void existing due to the lack of transnational civil liability regime for transboundary harm. Human rights arguments benefit from its universal language across jurisdictions, and due to the widespread adoption of various human rights instruments. Also, States are bound by the same negative and positive obligations.[175] In fact, these effects have already been observed. Joana Setzer argued that litigants are inspired by strategies and human rights arguments articulated in different jurisdictions since principles of climate change litigation travel very well.[176]

2.5.Concluding remarks

This chapter demonstrated the grand narrative of rights-based climate litigation. More particularly, it was shown that human rights arguments are a fruitful basis for developing forward-looking remedial demands and overcoming many of the barriers to environmental justice. In fact, a specific direct and indirect effects can already be confirmed or anticipated. Yet, these cases intended to change the behaviour of actors with a specific set of obligations and responsibilities, namely the States. States are the main actors responsible for respecting, protecting and fulfilling human rights. For this purpose, States must ensure policy coherence in a way that would not undermine their human rights obligations.

The remaining part of the thesis will explore the extent to which some of these human rights obligations can be expected from corporations that have traditionally not been considered to

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[169] *Cláudia Duarte Agostinho et al. v Portugal and 32 other States* (n 123), para 21.
[170] ibid.
[171] ibid, para 14.
[172] Peel and Osofsky (n 44) 40.
[173] It has been criticised though that the applicants are seeking to expand the ECtHR's environmental rights jurisprudence in order to develop the rules under UNFCCC and Paris Agreement. Ole W Pedersen, 'The European Convention of Human Rights and Climate Change - Finally!' (*EJIL:Talk!*, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 20 April 2021.
[174] Peel and Osofsky (n 44) 40.
[175] ibid.
[176] *Climate Change in the Courts* <https://www.youtube.com/watch?v=aRs5snxhVWU&ab_channel=IUCNWCEL>.

have obligations arising from public international law.[177] It will be analysed whether human rights-based climate litigation principles can travel not only between different jurisdictions but also between regimes and apply to different duty-bearers.

[177] ibid.

3. Business and Human Rights Regime

This chapter will delve into the business and human rights regime. The aim of this exploration is to understand to what extent does the regime account for climate change impacts on human rights and impose obligations to remedy.

3.1.Private sector's role in climate change

There are increasing calls from international and national actors, including shareholders, for corporations to take active part in climate actions. These arguments are often based on moral considerations, especially in relation to Carbon Majors.[178] For example, the fact that Carbon Majors have known about their impacts for decades, yet continued to deny the risks or funded disinformation campaigns, especially during the period when most of the emissions have been released, warrants a moral responsibility to act. Likewise, moral responsibility arises due to the benefits these companies have gained by extracting fossil fuels and the fact that they are one of the only agents who have the adequate capacity to act.[179] These opinions have also fuelled more legal arguments going as far as to say that businesses are duty-bearers in relation to climate change impacts, and must be accountable for their greenhouse gas emissions, as well as participate responsibly in the climate change mitigation process.

The role of corporations in causing climate change has become clearer after the Heede report was published by the Climate Accountability Institute.[180] The report analysed historical emissions of specific carbon producing entities and concluded that most of the CO2 emissions can be traced to 90 Carbon Majors.[181] These economic actors are responsible for 63% of cumulative emissions. The report disaggregated the emissions of nation States (i.e. cumulative emissions of all emitting entities, including private persons) while separating the emissions of state-owned fossil fuel companies (e.g. Gazprom's emissions are accounted separately from Russia's), and investor-owned fossil fuel entities (e.g. Shell, Total, BP). The report attributed 21.5% of overall emissions to nation States, 19.8% to state-owned corporations, and the largest share of 21.7% of emissions to investor-owned Carbon Majors.[182] Therefore, the report clearly illustrates the role of Carbon Majors in global warming.

In addition to direct contribution to climate change, Carbon Majors have also been major players in influencing climate regulations and dissemination of (mis)information. For example, it was uncovered in 2015 that ExxonMobil engaged in climate research already in the 1970s and 1980s.[183] The research demonstrated the future impacts of climate change and showed the role Exxon's own emission and activities played in it. However, instead of disclosing this information, Exxon began an extensive campaign against climate science by spreading misinformation, lobbying against regulations and funding internal and university collaborations

[178] Marco Grasso and Katia Vladimirova, 'A Moral Analysis of Carbon Majors' Role in Climate Change' (2020) 29 Environmental Values 175.
[179] ibid.
[180] Heede (n 62).
[181] ibid 16.
[182] ibid.
[183] David Hasemyer and John H Cushman Jr., 'Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty' (*Inside Climate News*) <https://insideclimatenews.org/news/22102015/Exxon-Sowed-Doubt-about-Climate-Science-for-Decades-by-Stressing-Uncertainty/> accessed 12 April 2021.

undermining the existing climate warnings. From the 1980s to mid-2000s, the company was a leader in climate change denial, opposing regulations to curtail global warming.[184] Regrettably, Exxon is not the only oil company involved in opposition to climate action.[185]

In addition to the obvious suspects, Carbon Majors, another type of commercial actors are likewise being pressured to change their involvement in climate change, namely financial institutions and investment funds. There is an increasing number of divestment campaigns to reduce financial flows to fossil fuel industry and to ensure a transformation to green economy.[186] The role of financial institutions is also crucial for climate action. Banks and investment funds play a big role in enabling and facilitating fossil fuel industry's expansion through their investments.[187]

3.2.Climate governance in private sector

In addition to the stakeholder-led pressure to change behaviour, more tangible governance proposals that suggests ways for the private sector to commit to climate action have followed For instance, a group of experts in international, environmental and tort law have composed the Oslo Principles on Global Climate Change Obligations.[188] These principles aim to bring clarity to the normative jungle that governs the conduct and obligations of States and enterprises vis-à-vis climate change.[189]

The Oslo Principles explicitly claim that that both States and enterprises are the main duty-bearers in the fight against climate change, and that these obligations are invoked on human rights grounds. The Oslo Principles address both of the corporate actors analysed in this thesis. Principle 28 refers to enterprises involved in fossil fuel production and Principle 30 concerns corporations in banking and financial sector.[190] The latter states that these companies "should take into account the greenhouse gas effects of any projects they consider financing."[191] The importance of finance sector's obligations were also confirmed in one of the principles concerning State obligations that requires the State to refrain from financing or subsiding new facilities that will result in excessive emissions.[192] The commentary to this principle suggests

[184] ibid.
[185] Zach Boren, Alexander C Kaufman and Lawrence Carter, 'Revealed: BP And Shell Back Anti-Climate Lobby Groups Despite Pledges' (*HuffPost*, 28 September 2020) <https://www.huffingtonpost.co.uk/entry/bp-shell-climate_n_5f6e3120c5b64deddeed6762> accessed 12 May 2021.
[186] Emma Howard, 'The Rise and Rise of the Fossil Fuel Divestment Movement' (*The Guardian*, 19 May 2015) <https://www.theguardian.com/environment/2015/may/19/the-rise-and-rise-of-the-fossil-fuel-divestment-movement> accessed 12 May 2021.
[187] UN Forum on Business and Human Rights, *Addressing Climate Change* (2019) <http://webtv.un.org/watch/addressing-climate-change-forum-on-business-and-human-rights-2019/6109626824001/?term=&lan=spanish> accessed 10 May 2021.
[188] Expert Group on Global Climate Obligations (n 85).
[189] The Principles are based on local, national, regional and international sources that include obligations from tort law, environmental law and international human rights law. ibid 3.
[190] Expert Group on Global Climate Obligations (n 85).
[191] ibid.
[192] ibid, Principle 21.

that States might be legally obliged to pass a legislation with an aim to prevent banks and financial institutions to finance "enabling, inducing or instigating such activities".[193]

Another expert group, though partly consisting of the same legal experts, formulated the Principles on Climate Obligations for Enterprises. The aim of these Principles was to clarify the legal obligations of enterprises relating to the steps they must take to contribute to climate action. The focus of the Principles is on mitigation, not adaptation or loss and damage related issues. The Principles represent the expert's groups interpretation of existing legal obligations.[194]

Such expert group-led principles could drive the discussion on businesses' climate action responsibilities in a way that State-developed principles could not since the former would not be limited by political and economic considerations.[195] Instead of being stuck in a "super wicked" policy-making environment, expert groups can articulate ambitious expectations that could inform the meaning of international standards.

For instance, the Special Rapporteur on Human Rights and the Environment has built on these two sets of Principles and clarified the specific human rights due diligence obligations of corporations vis-à-vis climate change in the Safe Climate report.[196] Since neither of the Expert Group developed principles take a rights-holders perspective but instead seem to take a financial risk management perspective,[197] it is commendable that the subsequent Safe Climate report built on these interpretations and clarified the responsibilities towards rights-holders.

Nevertheless, the pressure to act and existing voluntary guidelines have not been followed by change in business behaviour. When analysing the actions of eight major oil, gas and coal companies,[198] the Union of Concerned Scientists found that although some companies had publicly supported Paris Agreement commitments, none of them had accompanied this commitment with company-wide emission reduction target.[199] Additionally, all assessed companies are members of trade associations that are disseminating false information about climate science or aim to impede climate action.[200] This indicates that the external and internal pressure have not been enough to compel action to reduce emissions, or for the States to regulate these companies accordingly.

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[193] Expert Group on Global Climate Obligations, 'Commentary to the Oslo Principles on Global Climate Change Obligations' (2015) 80 <https://globaljustice.yale.edu/sites/default/files/files/Oslo%20Principles%20Commentary.pdf> accessed 12 May 2021. Seck (n 63) 9.

[194] 'Principles on Climate Obligations of Enterprises' (Expert Group on Climate Obligations of Enterprises 2018).

[195] This point was made by Surya Deva in the 8th Annual Forum on Business and Human Rights (n 187).

[196] UN General Assembly, 'Safe Climate' (n 57).

[197] Seck (n 63) 9–10.

[198] List of analysed companies: ArchCoal, BP, Chevron, Conoco Phillips, CONSOL Energy, ExxonMobil, Peabody Energy and Shell. Union of Concerned Scientists, 'The 2018 Climate Accountability Scorecard: Insufficient Progress from Major Fossil Fuel Companies' (2018).

[199] ibid 12–13.

[200] ibid 9.

3.2.1. Need for regulatory change

Therefore, there is a similar need for alternative regulatory pathways as there was due to inaction by States. Could strategic litigation against these two types of corporations, Carbon Majors and financial institutions, fill that role? The previous chapter demonstrated how the rights turn in litigation against States has achieved direct and regulatory effects for climate action. Could reliance on human rights have a similar effect for the purpose of regulating corporations?

Human rights obligations of States were invoked because States are traditionally considered the only duty-bearers under international human rights law. However, the business and human rights regime has emerged since 1990s which could motivate applicants to utilise human rights arguments against corporations. The fourth chapter will delve into specific cases in which applicants are relying on the business and human rights regime. Yet, the business and human rights regime includes many particularities and could not said to impose the same set of obligations on corporations that States owed to individuals in their jurisdiction.

Therefore, it will firstly have to be explored what responsibilities corporations have to respect human rights, and whether climate impacts are covered by these responsibilities. In the Safe Climate report, the Special Rapporteur stated that as a first measure, companies should comply with the UNGPs that are the backbone of the business and human rights regime. The next section will introduce the regime and the UNGPs.

3.3.Evolution of the business and human rights regime

The first international soft law instruments aiming to regulate business conduct were adopted by the Organisation for Economic Co-operation and Development (OECD) in 1976 and International Labour Organisation (ILO) in 1977, namely the OECD Guidelines for Multinational Enterprises and the ILO Tripartite declaration of principles concerning multinational enterprises and social policy. However, these instruments did not articulate specific human rights responsibilities or expectations of corporations beyond labour rights.

More specific human rights expectations originate from the UN. There were increased calls for companies to take more active part in achievement and fulfilment of a sustainable development in the end of the 1990s resulting in the launch of the Global Compact in 2000. This platform has now become the largest Corporate Social Responsibility initiative under which companies commit to ten principles covering human rights, labour, environment and anti-corruption.[201] The Global Compact, however, is a voluntary initiative and has received a lot of criticism including claims of greenwashing. The platform reviewed its membership policies to encourage more transparency and accountability, and decided to expel a large number of companies who were considered free riders.[202]

In addition to reforming the Global Compact, the business and human rights regime has strived towards more regulatory approach. However, regulatory developments for corporate

[201] United Nations, 'Global Compact' (2000) <https://www.unglobalcompact.org/> accessed 10 May 2021.
[202] Jo Confino, 'Cleaning up the Global Compact: Dealing with Corporate Free Riders' (*The Guardian*, 26 March 2012) <https://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash> accessed 10 May 2021.

accountability experienced a gridlock. In 2003, the UN proposes draft Norms that would have governed corporate accountability in relation to human rights; yet, the negotiations to adopt these norms faced significant resistance and were therefore abandoned.[203]

The process to regulate corporate conduct continued with the UN Commission on Human Rights adopting a resolution in 2005 to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises.[204] The mandate required the special representative to "identify and clarify standards of corporate responsibility and accountability with regard to human rights".[205] John Ruggie, the appointed special representative, proposed a "Protect, Respect and Remedy" framework in 2008 that addressed business involvement in human rights abuse. The framework was operationalised in the United Nations Guiding Principles on Business and Human Rights (UNGPs) and unanimously endorsed by the Human Rights Council in 2011.[206] The UNGPs have now become the most widely acknowledged and authoritative instrument on human rights responsibilities of corporations.

The Guidelines have influenced even pre-existing responsible business conduct standards. For example, after the adoption of the UNGPs in 2011, the OECD revised its Guidelines for Multinational Enterprises.[207] A chapter on human rights was added reflecting the approach of the UNGPs, namely the Protect, Respect, Remedy framework. These Guidelines are the only state-adopted responsible business conduct standards. The ILO MNE Declaration also endorses the UNGPs.[208] Furthermore, the subsequent developments at the European Union and national level have been informed by the concepts and ideas of the UNGPs.

Hence, due to the importance and relevance of the UNGPs, this instrument will be considered the basis of the business and human rights regime. The next section will introduce the UNGPs and in-depth and will highlight the relationship between these obligations and climate change.

3.4.United Nations Guiding Principles on Business and Human Rights

It is important to re-emphasise the status of the UNGPs. The architect of the Guidelines, John Ruggie, has consistently stated that UNGPs cannot be regarded more than a soft law instrument.[209] Although the UNGPs have inspired legislative developments, and indeed continue to do so,[210] no legally binding obligations nor liability can be inferred from the

[203] For more on the developments and debates on creating a regulatory business and human rights regime, see John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013).
[204] UN Office of the High Commissioner for Human Rights, 'Human Rights and Transnational Corporations and Other Business Enterprises. Human Rights Resolution 2005/69' (2005) UN Doc E/CN.4/RES/2005/69.
[205] ibid 1.
[206] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56).
[207] OECD Guidelines for Multinational Enterprises Edition 2011.
[208] ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Fifth Edition)' (Governing Body of the International Labour Office 2017).
[209] John Gerard Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Limited 2020).
[210] In addition to the French law and the upcoming proposal by the European Commission, see a report on mandatory human rights due diligence proposals in UN Office of the High Commissioner for Human Rights,

Principles themselves.[211] Instead, the normative influence of the instrument is dependent on the endorsement by States and other key stakeholders.[212] This adamant rejection of the legal force can partly be explained by Ruggie's own background as a political scientist, but also by the political gridlock that the principles had to appease after the failure of the UN Norms in 2003.

To overcome the stalemate, UNGPs rely on principles that were borrowed from the political sciences. Firstly, the development of the regime, and thereby the obligations and responsibilities of States and businesses, is situated in a global economic system that is guided by the notion of 'embedded liberalism'. This political idea aims to find a balance between country's ambitious free trade regulations and the will and necessity to enhance welfare and reduce unemployment.[213]

Secondly, Ruggie was sceptical about a legal approach, and saw a much greater value in corporate voluntarism. His approach to creating the UNGPs were based on the idea of polycentric governance,[214] by which the actions of social actors (including businesses) are constrained not only by legal norms but also by social standards and expectations.[215] Thirdly, the UNGPs are meant to make a difference to the people whose lives are affected by business activities in whichever manner most sufficient and feasible. This was the premise for the position of 'principled pragmatism' that has become a guidepost for the UNGPs.[216] This indicates that the regime is rights-holder-centred rather than a tool of risk management for corporations.[217] Guided by these principles and subscribing to the idea of embedded liberalism, UNGPs consist of three pillars that reflect the 'Protect, Respect and Remedy' framework.

3.4.1. Pillar I: Protect

Under international human rights law, States have the duty to respect, protect and fulfil human rights in order to comply with their human rights obligations.[218] The duty to 'protect' directly relates to the conduct of third parties. Hence, Pillar I of the UNGPs reaffirms this obligation and clarifies what these duties mean in relation to corporations. According to the UNGP 1, States must "take appropriate steps to prevent, investigate, punish and redress" human rights abuses by business enterprises.[219]

'UN Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies' (2020) <https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf> accessed 5 May 2021.

[211] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56) para 14.

[212] Ruggie, The Social Construction of the UN Guiding Principles on Business & Human Rights, 2017 (downloads), p 1-2

[213] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (n 209) 63–64.

[214] John Ruggie, 'Embedding Global Markets: Lessons from Business & Human Rights' (CEL Annual Lecture, University College London 2015) <https://tinyurl.com/ybjty3mb> accessed 10 May 2021.

[215] UN Commission on Human Rights (n 72) para 70.

[216] ibid 81.

[217] This point has also been confirmed in John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 European Journal of International Law 921.

[218] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018) 97.

[219] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 1.

Climate change is not explicitly addressed in the UNGPs, and therefore it has been doubted whether the human rights impacts of greenhouse gases constitute a business and human rights issue subject to duty of protection of States.[220] The previous chapter, however, clearly demonstrated that the positive obligations of States to protect human rights include a duty to reduce climate change-related impacts. Therefore, it can also be concluded that climate change should warrant States' positive obligation to regulate business activities that produce significant emissions levels. The OECD Guidelines that include broader responsible business conduct standards already include an environmental chapter that might suggest a responsibility to take climate action.

The UNGP 3 outlines an operational principle how to regulate business conduct in a manner that aims to reduce climate change impacts on human rights. It obliges States to enforce laws that require businesses to respect human rights; ensure policy coherence; provided businesses with guidance on how to fulfil their responsibility to respect; and encourage or require businesses to enclose their actions taken to mitigate their human rights impacts.[221] The design and legal force of these measures is left for the States to decide. The UNGPs propose a 'smart mix' of measures that could regulate business conduct. This smart mix could comprise of mandatory and voluntary, international and national.[222]

The French Duty of Vigilance law, adopted in 2017, is an example of how the Pillar I obligations of States has been implemented through a legislation. The Vigilance Obligations that have been added to the Commercial Code of France require large companies to conduct due diligence in order to identify, address and mitigate adverse human rights risks, as well as environmental risks.[223] The European Commission has also promised to propose a mandatory human rights due diligence legislation that is anticipated to be tied to the EU Green Deal.[224] Therefore, these two legislative developments might suggest a clearer connection between the business and human rights regime and climate action.

3.4.2. Pillar II: Respect

The second pillar – Corporate Responsibility to Respect – reflects the added value of the UNGPs, as it is the most authoritative statement in international law concerning corporate responsibility.[225] It recognises that businesses have a responsibility to respect all human rights in all contexts. In addition to refraining from infringing on human rights, businesses are also expected to "address adverse human rights impacts with which they are involved."[226]

It is crucial to note that the 'responsibility to respect' is fundamentally different from the Pillar I 'duty to protect' human rights. Firstly, as mentioned, Pillar I reaffirms States existing legal obligations under international human rights law. However, as it has been perceived in the

[220] Toft (n 63) 23.
[221] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 3.
[222] ibid, Principle 3 commentary.
[223] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[224] European Parliament, 'European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2021) 2020/2129(INL).
[225] Van Ho (n 65) 2.
[226] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 11.

UNGPs, corporate responsibility to respect human rights is a transnational social norm rather than a legal obligation.[227] Secondly, even if the Pillar II 'responsibility' is to be used in a legal context, the scope of the moral obligation to respect is narrower than the obligation to 'protect' imposed on States. The latter includes the need to take proactive steps to ensure the protection of rights,[228] whereas to 'respect' is traditionally considered a "negative obligation not to take any measures that result in a violation of a given right".[229] The UNGPs claim to contribute with a workable approach of how businesses are expected to realise their responsibility to respect, rather than provide positive obligations to protect rights.[230]

The responsibility to respect is wide in scope since UNGPs incorporate, at a minimum, human rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.[231] However, these human rights instruments do not explicitly provide a right to healthy and sustainable environment since the right is not internationally recognised as established in the first chapter. Thus, similarly to States' obligations under Pillar I, it is unclear to what extent the corporate responsibility to respect applies in relation to climate impacts that undoubtably impact other rights included in the Pillar II.

3.4.2.1.Impacts framework

This confusion can arguably be resolved with a reference to the notion of 'impacts' in the UNGPs. To reiterate, the UNGPs require businesses to address "adverse human rights impacts" if these impacts "remove or reduce the enjoyment of human rights".[232] It has been suggested that this wording applies to a broader range of impacts that merely to direct violations of international human rights law.[233] Various business activities could reduce the enjoyment of human rights without qualifying as a violation of human rights law. In fact, an increasing trend to account for large-scale human rights impacts within the UNGPs has been observed. These large-scale impacts can be characterised by the following features: "due to the impact, human rights of a large number of individuals are affected; multiple actors (e.g. corporations) contribute to the impact; there is no clear line of causation from an individual corporation to the harm suffered by an individual victim; harmful acts are often part of a quasi-legitimate global economic activity and thus, not a paradigmatic breach of human rights".[234] These features mirror the characteristics that make climate change a unique and challenging environmental harm.

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[227] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (n 209) 75–76.
[228] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56); Mégret (n 218) 97, Principle 1.
[229] Mégret (n 218) 97.
[230] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (n 209) 76.
[231] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 12.
[232] UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (2012) UN Doc HR/PUB/12/02 5.
[233] David Birchall, 'Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights' (2019) SSRN Electronic Journal 122.
[234] Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142) 430.

The possibility to incorporate such large-scale human rights impacts to the UNGPs has not only been observed in relation to climate change but also in relation to financialisaton and tax evasion.[235] For instance, the Special Rapporteur on Extreme Poverty has stated that "Business practices that avoid taxation may breach their responsibility to respect insofar as such actions have a negative human rights impacts".[236] Likewise, increasing emissions will exacerbate climate change and by that contribute to adverse human rights impacts. Therefore, greenhouse gas emissions indeed reduce the enjoyment of human rights.

However, a member of the UN Working Group on Business and Human Rights S. Deva has, from the beginning, been critical of the framing of adverse effects as 'impacts' and not as 'violations'. Deva has argued that the "carefully chosen terms" in the UNGPs dilute the importance of human rights.[237] These terms include not only 'impacts' instead of 'violations' but, for example, also 'responsibility' rather than 'duty', 'social expectations' and 'due diligence'.[238] Deva argues that these abstract concepts have "the effect of rolling back the legal concretisation of corporate human rights obligations,"[239] and thereby result in "relative lack of normative force".[240]

It is indeed a valid critique of the UNGPs that could be linked back to the underlying premises of the UNGPs as outlined above. However, UNGPs are meant to constitute the starting point for the business and human rights regime and do not create new obligations for States nor for corporations. The regime is reflective of the existing international order and not aspirational. Therefore, it is understandable that strict legal terms, such as 'violation' are not used in order to refrain from creating confusion on the nature of the Guidelines. Instead, this critique could be relevant for scrutinising subsequent legislative developments that are inspired by the UNGPs.

David Birchall, one of the main proponents of the 'impacts' framework does not deny the fact that the framework is potentially legally unworkable and does not impose strict obligations on corporations. Yet, he argues that the transformative potential of the UNGPs lie precisely in this broad meaning of 'impacts framework'.[241] Birchall has specifically identified three areas where such an interpretation is crucial: firstly, to mitigate structural harm, secondly to tackle corporate power and thirdly, to achieve socio-economic justice. Climate change could be considered under all three areas. It is undeniably the cause of structural harm as the entire global economy runs on fossil fuels. The enormity of Carbon Majors' corporate power in climate change was already demonstrated in the beginning of this chapter. Additionally, the disproportionality of climate change-related human impacts for example on the loss of land and livelihood opportunities raise serious socio-economic justice questions. Furthermore, the UNGPs are

[235] Birchall, 'Any Act, Any Harm, To Anyone' (n 233) 122–123.
[236] UN Human Rights Council, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*' (2014) UN Doc A/HRC/26/28 para 7.
[237] Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 80.
[238] ibid.
[239] ibid.
[240] ibid 98.
[241] Birchall, 'Any Act, Any Harm, To Anyone' (n 233).

premised on the idea of 'principled pragmatism' aiming to improve the lives of rights-holders and aim to close the existing accountability gap, the broader impacts framework is a strong contribution to both of these aims.

Therefore, this paper will rely on the broader interpretation of 'impacts framework' in order to analyse the potential of the business and human rights regime to contribute to climate action. The next section will outline the operational aspects of Pillar II in order to understand what the responsibility to respect entails, especially in relation to climate change.

3.4.2.2.Due diligence

The UNGPs propose human rights due diligence (HRDD) as a means how to ensure respect for human rights and to address adverse impacts. Pillar II provides for a three-step process that establishes what 'responsible business conduct' means under the UNGPs. Businesses are required to 1) have in place a policy commitment to respect human rights, 2) conduct human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights, and 3) remediate any adverse impacts that they have caused or contributed to.[242] The due diligence measures are further dissected in UNGPs 17-21 in which the process of human rights impact assessment,[243] steps for effective and appropriate action,[244] tracking[245] and disclosure[246] are explained. These elements of the due diligence requirement aim to empower the relevant stakeholders who play an important role in the polycentric governance. For example, rights-holders must be consulted during the impact assessments and can therefore inform the corporations' mitigation measures. Also, the disclosure of risks and potential impacts should inform shareholders as well as clients and consumers.

Arguably, specific climate dimension of human rights due diligence is emerging.[247] Indeed, the recommendations in the Safe Climate report by the Special Rapporteur directly address the responsibilities of businesses vis-à-vis climate change. These include "reduction of greenhouse gas emissions from their own activities and their subsidiaries", as well as "from their products and services".[248] These could be said to correspond to the requirement of conducting a human rights impacts assessment under UNGP 17 that requires companies to "address the actual and potential human rights impacts" as climate change has adverse effects on human rights.[249] Another Guiding Principle relevant for impact assessments also stresses that businesses should not only identify adverse human rights impacts of their own activities, but also the ones resulting from their business relationships.[250] The Safe Climate report acknowledges these connections and requires businesses to "minimise greenhouse gas emissions from their suppliers".[251]

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[242] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 15.
[243] ibid, Principles 17-18.
[244] ibid, Principle 19.
[245] ibid, Principle 20.
[246] ibid, Principle 21.
[247] Macchi (n 63).
[248] UN General Assembly, 'Safe Climate' (n 57) para 72.
[249] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 17.
[250] ibid, Principle 18.
[251] UN General Assembly, 'Safe Climate' (n 57) para 72.

Thirdly, businesses must "publicly disclose their emissions, climate vulnerability and the risk of stranded assets"[252] that related to UNGP 17 and to the obligation to communicate how impacts are addressed. Fourthly, corporations are expected to "ensure that people affected by business-related human rights violations have access to effective remedies".[253] The latter is also a part of Pillar II responsibilities.[254]

The Safe Climate reports adds another element of obligations that fits with the aim of the UNGPs, namely to "do no harm" and with the notions of principled pragmatism and embedded liberalism. It states that "businesses should support, rather than oppose, public policies intended to effectively address climate change".[255] The last responsibility is interesting in light of (increasing) worries about corporate power,[256] as well as direct experiences of 'big oil' lobbying against climate regulations that were discussed before. The significant negative impacts of climate change have motivated various stakeholders to articulate similar aspects of due diligence in litigation against corporations, thereby confirming the climate dimension of HRDD.[257] These specific arguments will be discussed in the next chapter.

However, the emerging climate due diligence requirements might not become part of the HRDD process that easily. In fact, the HRDD process as it stands in the UNGPs might not be able to capture the true scope of climate change risks and following mitigation needs. The requirement of stakeholder consultation under UNGP 18 illustrates that well. It reads that the process of identification and assessment of any actual or potential adverse human rights impacts should include "meaningful consultations with potentially affected groups and other relevant stakeholders".[258] Climate change as a transboundary global harm affects the entire world population, albeit to a different degree at different times, which makes the stakeholder consultation either irrelevant or an insurmountable burden. Instead, the process could be tailored to climate change by reference to scientific reports that were the basis of future impacts in litigation against States.

Furthermore, UNGPs allow for corporations to prioritise mitigation actions according to the severity level of risks that have been identified during the human rights impact assessment process.[259] The severity level is determined based on their scale, scope and irremediable character.[260] Although climate change and the relevant human rights impacts satisfy all these three criteria points (scale, scope and irremediability), companies might exclude or deprioritise climate relevant mitigatory measures due to the nature of the harm, as well as the profitability of actions that contribute to it.[261] For instance, even the government of the Netherlands argued that it was not part of their own human rights obligations to mitigate climate change as climate

[252] ibid.
[253] ibid.
[254] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 22.
[255] UN General Assembly, 'Safe Climate' (n 57) para 72.
[256] For more on the impact corporate power has, see David Birchall, 'Corporate Power over Human Rights: An Analytical Framework' (2021) 6 Business and Human Rights Journal 42.
[257] Macchi (n 63).
[258] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 18.
[259] ibid, Principle 24.
[260] ibid, Principle 14.
[261] Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142) 432.

change is a global problem.[262] Furthermore, climate change is a result of legitimate economic activities. Carbon Majors' business model, for example, is built on the extraction and burning of fossil fuels. Also, these actions cater a global demand of energy. Therefore, prioritising the climate dimension of HRDD will require these companies to rethink their business model. Therefore, unless regulated by the State or the market, it is unlikely that companies profiting from fossil fuels will voluntarily prioritise the climate dimension of human rights due diligence.

Therefore, for the purpose of liability, it might be difficult for applicants to argue that a corporation has not taken adequate due diligence measures; unless the suggestions by the Special Rapporteur are adopted or endorsed by the business and human rights regime, or another climate-specific element or guidance added. Hence, it might be more productive to explicitly include a climate (or environmental) dimension to due diligence measures, as it is in the French Duty of Vigilance Law or in the OECD Guidelines.

3.4.3. Pillar III: Remedy

The UNGPs require companies to provide remedies for impacts that their actions or omissions have caused or contributed to.[263] As was said, this paper subscribes to the idea that these impacts include more than violations of international human rights law. This opens up for a possibility to achieve a remedy for climate change-related impacts as well. However, it must be kept in mind that the impacts framework might be legally unworkable posing challenges for achieving direct regulatory effect through litigation. The fourth chapter of the thesis will analyse whether current liability regimes are fit for the impacts framework.

The remedy mechanisms and outcomes are covered in the third pillar – Access to Remedy. This pillar focuses on rights-holders' opportunities to invoke their rights in cases of human rights infringements; therefore, it has been said that the remedy avenues must be rights-holder-centred.[264]

The UNGPs outline a three-fold system of remedy consisting of judicial and non-judicial mechanisms. Some scholars have argued that these remedy avenues form a hierarchy.[265] The lowest in the hierarchy list are the operation-level grievance mechanisms that the corporations are expected to set up as part of their Pillar II obligations. These are followed by non-judicial State-based mechanisms and judicial mechanisms. The latter are placed on the top of the remedy hierarchy.[266] Another way to describe the relationship between the different remedy mechanisms is to see them as complementary. Yet, even according to this interpretation, non-judicial grievance mechanisms are considered to be supporting or complementing legal avenues. The complementary system should provide a comprehensive access to remedy to the rights-holders.[267]

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[262] *Urgenda Foundation v The Netherlands* (n 119) para 5.1.
[263] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 13 commentary.
[264] UN General Assembly, 'Human Rights and Transnational Corporations and Other Business Enterprises. Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162.
[265] Miller-Dawkins, Macdonald and Marshall (n 67) 8.
[266] ibid.
[267] Van Huijstee and Wilde-Ramsing (n 68) 471.

This so-called 'bouquet of remedies' provides different opportunities for rights-holders to access remedial mechanisms; yet the availability does not guarantee adequate remedies. It has been argued that UNGPs have offered limited guidance on the actual remedial responsibility of corporations.[268]

The UNGP introduce three participatory terms that refer to ways businesses can be connected to adverse human rights impacts: cause, contribution and linkage.[269] Only the first two terms – cause and contribution – give basis for remedial responsibility. According to UNGP 22, "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."[270] For the purpose of the research question, it is necessary to analyse under which term do the actions of the corporations that fall within the scope of this thesis will qualify. Therefore, the meaning of the terms will now be elaborated.

3.4.3.1.Cause

The UNGPs explain the participatory terms merely by examples. For example, it is said that a company can be seen to have 'caused' an adverse impact if it is the "sole or main source of pollution in a community's drinking water supply due to chemical effluents from production processes".[271] The OHCHR has subsequently offered more principled guidance on the meaning of the terms. For instance, a business has 'caused' an impact "when its acts or omissions, without the involvement of other parties, reduce the realisation of a right."[272] How does this relate to emission of greenhouse gases?

In a case *Gbemre v Shell et al.* concerning air pollution and environmental harm caused by the gas-flaring practices of fossil fuel corporations in Nigeria, applicants alleged human rights violations.[273] Also, the plaintiffs claimed that these practices contribute to dangerous climate change that will additionally infringe on their rights. The Nigerian Court found that the gas flaring by the defendants indeed infringed on the constitutional human rights of the local communities due to the pollution as well as greenhouse gas emissions.[274] The Court ordered immediate cessation of gas flaring and, commendably, to set in motion processes that would ensure that the regulations and penalties for gas flaring are in line with the chapter on fundamental freedoms of the Constitution.[275] This judgment clearly indicates the direct effect that such litigation can have both on the behaviour of the company (cessation of gas flaring) and even on the legislation.

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[268] Van Ho (n 65).
[269] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56); UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (n 232) 16, Principle 13.
[270] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 22.
[271] UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (n 232) 17.
[272] Tara Van Ho, p 2 (fn 19).
[273] *Gbemre v Shell Petroleum Development Company of Nigeria Ltd et al* [2005] Federal Court of Nigeria FHC/B/CS/53/05.
[274] ibid.
[275] ibid 31.

However, it has been argued that such direct causation was only possible because the emissions were localised and easily imputable.[276] Since climate change is a result of cumulative emissions over a long period of time and by multiple of actors, it is not possible to analyse the remedial responsibilities of corporations under this participatory term. This, however, is very unfortunate from the right-holders' perspective since it does not matter for them whether the adverse impacts are caused by localised or delocalised emissions.

3.4.3.2.Contribution

The second participatory term that triggers remedial responsibility under the UNGPs is 'contribution'. One example offered in the Interpretative Guide is the following: "Providing data about Internet service users to a Government that uses the data to trace and prosecute political dissidents contrary to human rights".[277] The OHCHR has further clarified that 'contribution' refers to businesses' activities that together with other companies' similar activities negatively affect a right.[278] It is helpful that the notion of 'contribution' includes conducts of others as it allows for cumulative carbon emissions to be included. However, the OHCHR adds that 'contribution' implies an element of 'causality' that extends beyond trivial or minor effect. However, it is not a strict 'but for' test.[279] In the context of climate change, it raises questions whether there is a threshold of emissions that are considered 'beyond trivial or minor' and if so, where to draw the line.

Furthermore, climate change is a result of emissions by multiple emitting companies, as well as enabled and facilitated by a large number of other businesses that benefit from the emissions. Setting aside the question of causality for a moment, it appears that the term 'contribution' could capture the conduct of all these different actors based on three distinct ways of contribution that has been identified. The first option is not applicable as none of the actors could be said to "create strong incentives for a third party to breach international human rights law".[280] Emitting greenhouse gas emissions is not a direct violation of international human rights law, nor are one actors' emissions single-handedly causing adverse human rights impacts. Yet, companies could 'contribute' to climate change-related impacts by "undertaking activities in parallel with a third party, leading to cumulative impacts that harm a right".[281] It could be said that this describes the role of Carbon Majors. The other commercial actors analysed in this

[276] Anna Riddell, 'Human Rights Responsibilities of Private Corporations for Climate Change? The State as a Catalyst for Compliance' in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights* (Routledge 2016) 66.
[277] UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (n 232) 17.
[278] UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (n 232); Van Ho (n 65) 2; UN Office of the High Commissioner for Human Rights, 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (2017).
[279] UN Office of the High Commissioner for Human Rights, 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (n 278) 5.
[280] Rachel Davis, 'The UN Guiding Principles on Business and Human Rights and Conflictaffected Areas: State Obligations and Business Responsibilities' (2012) 95 International Review of the Red Cross 961, 973.
[281] ibid.

thesis could potentially qualify under the third way companies might contribute to harm, namely by "facilitating or enabling the abuse".[282]

3.4.3.3.Linkage

The UNGPs also refer to the term 'linkage'. It refers to a situation where a company is linked to harm via operations, products, services, and business relationships.[283] Linkage, however, does not invoke remedial responsibility.[284] Yet, it is interesting to mention that even this term requires some degree of causality between the harm and the company, not only a relationship between the two companies.[285]

Therefore, there is a strong element of causation relevant for all participatory terms and for establishing remedial responsibility. The difficulties of proving the causal link and obtaining remedy will be outlined in the next chapter.

3.4.3.4.Non-compliance with HRDD requirements as a basis for remedy

Interestingly, it has also been suggested that compliance with the HRDD requirement could indicate remedial responsibilities.

The role of due diligence has been clarified during a debate that was sparked by an argument by J. Bonnitcha and R. McCorquodale, claiming that the UNGPs create confusion by introducing two different concepts of due diligence. They argued that based on the foundational principles, due diligence can be regarded as a standard of care since it reads that "businesses breach their basic responsibility to respect human rights whenever they infringe human rights, triggering a correlative responsibility".[286] According to this interpretation, Bonnitcha and McCorquodale suggest that businesses would have to provide remedy whenever a breach occurs, amounting to a strict liability standard.[287] Yet, the operational principles in the UNGPs rather indicate that "due diligence is a standard of conduct that businesses must meet to discharge their responsibility to respect human rights".[288] Thus, it seems that simultaneously due diligence constitutes a standard of conduct in some cases. They suggest that this could be applied for the adverse effects on human rights by third parties in the supply chain.[289] This argumentation was disputed by Ruggie and Sherman. They noted that the sole purpose of due diligence is to provide a means by which companies can "understand the specific impacts not merely manage commercial risks"; therefore, it cannot be seen as merely a standard of conduct.[290]

Bonnitcha and McCorquodale concluded the 'debate' by finding an agreement point: "A business enterprise has a responsibility to provide remedy for adverse human rights impacts

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[282] ibid.
[283] Van Ho (n 65) 3.
[284] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 22.
[285] UN Office of the High Commissioner for Human Rights, 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (n 278) 6.
[286] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899, 909.
[287] ibid 912.
[288] ibid 909.
[289] ibid 912.
[290] Ruggie and Sherman (n 217) 924.

that it causes, or contributes to, regardless of whether those impacts were difficult to foresee or costly to avoid".[291] Therefore, this debate confirmed that responsibility of remedy follows regardless of the due diligence measures if the company in question has caused or contributed to adverse human rights impacts. However, this debate implies that harm has already occurred due to inadequate due diligence measures. Therefore, it might be that remedial responsibility arising from the business and human rights responsibility is more suited for adaptation or loss and damage related claims. The relevance for mitigation-related remedy demands will be tested in the next chapter.

3.4.4. Available remedies

Imagining that all the raised causation challenges are overcome, what are the remedies that the UNGPs provide for the rights-holders? The substantive elements of the access to remedy pillar require receival of relief. This could be in a form of apology, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions,[292] or even prevention of harm through, for example, injunctions of guarantees of non-repetition.[293]

This framing of remedy functions appears to provide an opportunity to receive remedies that can have direct regulatory effects. The UNGPs explicitly list prevention of harm by means of injunction of guarantees of non-repetition as one example of relief.[294] This remedy option would potentially allow to bring climate change-related human rights claims with an aim to demand mitigation measures from companies. Indeed, it has been argued that access to remedy under UNGPs should result in transformative outcomes, rather than merely compensations.[295] Therefore, it could be said that prevention of harm could include more comprehensive due diligence measures, including mitigation of climate impacts.

However, the available 'guarantee of non-repetition' cannot be necessarily translated into an 'order' of ceasing or reducing emissions since emitting itself is not illegal. Likewise, it has not been established what levels of emissions by a specific company is considered harmful or wrongful, i.e. "beyond trivial". Regulation of a legal economic activity is usually left to the executive and legislative branches of the government, especially in areas that concern decisions that cross-cut several socio-economic questions; for example, energy and transport needs, as well as employment opportunities. Another complexity arises when these companies service the energy needs of several countries. Therefore, it is highly unlikely that the preventative remedies under the UNGPs can amount to an injunctive order of emission reductions.

3.5.Concluding remarks

As the role of corporations, especially Carbon Majors and financial institutions, becomes clearer, the calls for changing the behaviour of these actors have increased. It could be that the business and human rights regime can assist in stimulating regulatory action by imposing

[291] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III' (2017) 28 European Journal of International Law 929, 932.
[292] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56).
[293] ibid.
[294] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 25 commentary.
[295] Thompson (n 67) 60.

climate change-related human rights responsibilities on corporations. However, the chapter uncovered many of the difficulties that might hinder these efforts, arising from the non-binding regime itself as well as from the uniqueness of the harm. On the other hand, it is a positive starting point that the business and human rights regime can address large-scale impacts. The next chapters will discuss whether this can also result in regulatory action achieved through accountability measures.

4. Judicial remedies of the business and human rights regime

The lack of attention to climate change in the business and human rights regime that was highlighted in the previous chapter was directly addressed during the 8th UN Annual Forum on Business and Human Rights in 2019.[296] The question of accountability surfaced, and two strategies were proposed. Firstly, there were calls for dialogue, i.e. the non-coercive route. Yet, it was questioned whether Carbon Majors would genuinely change their strategies and business models without a legally binding decision.[297] Hence, a second strategy – litigation – was explored. However, it is questionable whether the existing legal frameworks are fit for holding business enterprises accountable for their contribution to climate change.[298] This chapter will delve into that discussion.

The aim of this chapter is to demonstrate the possibilities and limitations to replicate the promising strategic climate litigation against States outlined in chapter II, thereby achieving a legally binding decision in relation to mitigation-related demands. It will be analysed to what extent human right arguments contribute to this pursual while keeping in mind the particularities and non-binding nature of the business and human rights regime. Both direct and indirect effects of climate litigation will be highlighted as these are relevant for the overall purpose of this discussion, namely analysing how to utilise human rights framework for the purpose of achieving climate action.

4.1.Suitability of judicial remedy mechanisms

As previously mentioned, judicial remedy mechanisms are on top of the UNGPs' hierarchy of remedies. Indeed, one could quite easily imagine the advantages of taking Carbon Majors or financial institutions to court for their adverse impacts on people or the environment. Judicial mechanisms are able to pass a legally binding decision on liability, order and enforce appropriate remedies that is a necessary criterion to being considered an effective remedy mechanism.[299] One the other hand, to achieve that, a legal regime must cover the alleged abuse in a way that allows to hold possible duty-bearers accountable.[300] In almost no countries do specific human rights-based obligations of businesses exist for the purpose of establishing liability, with the only exception being the French Duty of Vigilance Law, highlighted in the previous chapter.[301] Hence, due to the lack of specific jurisdictional obligations of corporations, and in the absence of dedicated liability regimes for human rights infringements by corporations, most cases are brought within the limits of tort law.

Despite of the preferability of judicial remedies, there are many studies outlining several obstacles that victims of business-related human rights violations are faced with in obtaining

[296] UN Forum on Business and Human Rights (n 187).
[297] Maud Sarlième, 'Climate Change: How to Make Corporations Responsible?' (*JusticeInfo.net*, 5 December 2019) <https://www.justiceinfo.net/en/43130-climate-change-how-to-make-corporations-responsible.html> accessed 4 May 2021.
[298] ibid.
[299] UN Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse' (United Nations General Assembly 2016) UN Doc A/HRC/32/19.
[300] ibid.
[301] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

access to these mechanisms.[302] These barriers include high legal costs, strict standing requirements, strict burden of proof requirements, and parent company's liability.[303] These obstacles have made it difficult for the litigants to prove the elements that are required to establish tort liability: damage, duty of care and causality. In the context of climate change, the uniqueness of the harm and the resulting legal uncertainties that was explained in the second chapter further exacerbate these challenges. Thus, tort law has been criticised for being unsuited for impacts such as climate change due to the reliance on individual responsibility theory.[304]

4.1.2. Precedents from asbestos and tobacco litigation

However, climate change-related cases are not the first time that tort law mechanisms have had to accommodate and adjudicate claims that entail a certain level of scientific and legal uncertainty and multicausality. Similar ambiguities regarding liability existed previously in cases of harm caused by asbestos and tobacco. In fact, it has been suggested that climate litigation could learn from and rely on asbestos and tobacco cases due to the many similarities. Firstly, all three situations concern a harmful outcome that derives from legal conduct. Secondly, none of the harms has been directly and single-handedly caused by one actor. Thirdly, at the time when litigation for asbestos and tobacco-related harm were launched, these substances were not strictly regulated, similarly to the release of greenhouse gas emissions. Lastly, in all three contexts, there is a time lag between exposure to or release of the substance and the harmful effects.[305]

The relevance of these cases also related to the regulatory effect and remedy that these cases have achieved through strategic litigation. A landmark asbestos-related decision was given in the case of *Fairchild et al. v Glenhaven Funeral Services Ltd et al.*.[306] The case concerned a man who had died of a type of tumour that is caused by exposure to asbestos fibres. Mr Fairchild was exposed to the fibres while working for different companies. As the effects of asbestos fibres do not occur instantly but the harm develops over many years,[307] it was difficult for the plaintiffs to establish causation and pinpoint which of the employers was individually liable for the harm.[308] The Court, however, concluded that the defendants materially increased the risk of harm which resulted in joint and several liability.[309]

An example of a successful litigation against a tobacco company is the case of *Bullock v Philip Morris* in which the defendant were found to be liable and owed damages to Mrs Bullock's inoperable lung cancer caused by smoking.[310] This is an important precedent in relation to climate change. Whereas the type of tumour Mr Fairchild had contracted was specific to

[302] One of the latest reviews of the Access to Remedy was conducted by the European Union Agency for Fundamental Rights, 'Business and Human Rights - Access to Remedy' (Publication Office of the European Union 2020).
[303] ibid.
[304] Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142) 435.
[305] Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841, 857.
[306] *Fairchild v Glenhaven Funeral Services Ltd et al* [2002] 22 UKHL (House of Lords).
[307] ibid 7.
[308] ibid 2.
[309] *Fairchild v Glenhaven* (n 306).
[310] *Bullock v Philip Morris USA Inc* [2011] California Court of Appeal, Second District B222596.

exposure to asbestos fibres, lung cancer is not necessarily caused only by tobacco smoke.[311] Similarly, we are not yet able to say that a specific extreme weather event that has adverse human rights risks was caused by greenhouse gas emissions. Therefore, the uncertainty regarding the causal link between harm and alleged cause is not new to private law.

Nevertheless, this paper would suggest that climate change is a more complex subject matter than asbestos and tobacco, thereby introducing additional challenges for achieving regulatory effect through strategic litigation. For instance, the plaintiffs of the given examples did not request an injunction to order reduction of cessation of certain activities to prevent future harm but requested a compensatory relief for already materialised harm. Therefore, the aim of these cases was not to achieve preventative remedy and direct regulatory effect, although these cases might have had significant indirect effects, for example, incentivising the State to regulate the market. Therefore, it should not be assumed that these precedents support climate litigants' demands for direct regulatory effect. Similarly, the potential of similar indirect effects of strategic climate litigation will have to be discussed.

Another crucial difference between tobacco and asbestos cases and climate cases concerns the actors involved. It might be more complicated to establish the list of duty-bearers in climate litigation. Ganguly et al. argue that developments in attribution science will bring the climate litigation closer to the precedents of tobacco and asbestos litigation because litigants will be able to pinpoint a group of corporations that are potentially liable for the harm.[312] In fact, the Heede report provides a good starting point by quantifying the historic emissions of the Carbon Majors, although developments in attribution science are also needed.

This paper would disagree with Ganguly et al. and argue that the causation and attribution challenge might not be fully resolved by these developments due to the unique interdependency and connectedness of the fossil fuel value chain. Unlike with fossil fuels, it cannot be said that almost the entire global economy runs and depends on tobacco or asbestos. Nor can it be said that a large number of other economic actors (e.g. financial institutions) are enablers of or benefit from the asbestos and tobacco industry to the same extent as these actors contribute to the fossil fuel industry. Therefore, even if attribution science develops rapidly, the complexities of causation and attribution might remain. The following sections will outline the development in climate litigation to establish whether these challenges indeed exist.

4.2.Developments in litigation

Strategic climate change litigation continues to be pursued as a tool to change the behaviour of corporate actors in relation to climate change and to raise awareness about the role of fossil fuel corporations.[313] Most of the climate cases against corporations have been and are being pursued in the United States; yet, there is an increasing development in other parts of the world to challenge the actions of Carbon Majors.[314] Based on global developments in strategic climate

[311] American Cancer Society, 'What Causes Lung Cancer?' <https://www.cancer.org/cancer/lung-cancer/causes-risks-prevention/what-causes.html> accessed 6 May 2021.
[312] Ganguly, Setzer and Heyvaert (n 305) 857.
[313] Setzer and Byrnes (n 87) 18.
[314] Setzer and Byrnes (n 87).

litigation, two waves of climate litigation against corporations have been identified by Ganguly et al.[315]

The first wave cases did not rely on specific human rights obligations, nor did they request mitigation related remedies.[316] Plaintiffs mostly claimed damages that occurred due to extreme weather events were exacerbated by the actions of corporations. The cases in the first wave were largely unsuccessful due to lack of consensus on the effects of greenhouse gas emissions, obligations resulting from the effects, as well as underdevelopment of climate and attribution science. For example, one of the most significant cases in the first wave has been *Native Village of Kivalina v ExxonMobil*[317] that was dismissed on the grounds that there was "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity or group at any particular point in time".[318] This clearly indicated the initial challenge of causation. The Court also highlighted that to determine liability, they should have determined retroactively the limitations that should have put on greenhouse gas emissions, and to justify who are the duty-bearers for the cost of climate change. This, however, was claimed to be a policy decision that the Court was not willing to make.[319] Similar grounds for dismissal were given in the case of *State of California v General Motors et al.*[320]

Arguably a second wave of litigation has emerged that is characterised by a new scientific, discursive and legislative context.[321] Therefore, some of the challenges experienced in the first wave might carry less weight, especially thanks to the scientific developments. The plaintiffs challenging the climate policies of States have already benefitted from the advantages of scientific developments as was previously discussed. These new contextual advantages, that will be discussed in relation to case law, have resulted in two new motivations for plaintiffs taking up these cases.

Firstly, plaintiffs are recognising that corporations are the right actors whose actions can be challenged. This has been due to the growing calls for corporations to take a more active part but more importantly, for articulating that corporations are indeed duty bearers.[322] The second motivation comes from the urgency to take climate action. It is increasingly recognised that action against corporations with an aim to require emissions reductions will have a significant global effect.[323]

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[315] Ganguly, Setzer and Heyvaert (n 305).
[316] ibid 844.
[317] The case concerned the role energy companies play in climate change, and the effect that climate change has had on the Inuit community in Alaska. The plaintiffs claimed that due to climate change effects, the ice formed on the coast used to protect the Village of Kivalina against strong storm waves has been forming later and melting earlier, thereby leaving the shore open to destruction by storms. In fact, due to these effects, the Hurricane Katrina forced the inhabitants of Kivalina to evacuate and relocate. *Native Village of Kivalina v ExxonMobil Corp* [2009] US District Court for the Northern District of California 4:08-cv-01138-SBA.
[318] ibid, 20.
[319] ibid, 14-15.
[320] A public nuisance action was initiated by the State of California, seeking damages from automobile companies for their contribution to climate change. *People of the State of California v General Motors Corporation et al* [2007] US District Court for the Northern District of California C06-05755 MJJ.
[321] Ganguly, Setzer and Heyvaert (n 305) 849.
[322] For example: *Luciano Lliuya v. RWE AG* (n 89). Setzer and Byrnes (n 87).
[323] Ganguly, Setzer and Heyvaert (n 305) 844–845.

Three types of cases are emerging within the second wave caselaw. Firstly, Carbon Majors are being brought to court to claim damages for climate change similarly to the cases launched during the first wave.[324] Such litigation, however, represents climate action pillars of attribution and/or loss and damage. Thus, the discussion will not delve into the potential success or remaining challenges. The other two types of cases that were identified in the second wave of litigation aim at changing the current and future corporate behaviour to achieve mitigatory effect.

The second category of cases is more focused on the role of polycentric governance, and has included more actors than just Carbon Majors. These claims are often brought by shareholders who challenge the company's failure to account for climate risks and incorporate it to decision-making, as well as failing to disclose this information to the shareholders or other beneficiaries.[325] Cases are also being brought on the grounds of companies misleading investors, for example in the case of *New York AG v Exxon.*[326] This has not been a successful strategy for proving responsibility for climate change since the Court decided in *New York AG v Exxon* that the investment decisions were not taken based on the misinformation.[327] The Court, however, mentioned that the decision did not imply whether or not Exxon was responsible for contributing to climate change.[328]

The potential of these cases to receive regulatory effect will not be thoroughly assessed in this thesis since these claims relate more to the risk management approach that is also depicted in the Oslo Principles and Principles on Climate Obligations of Enterprises. They challenges the obligations that corporations hold to their shareholders and not directly to rights-holders. Therefore, although these cases are directly concerned with the human rights impacts of climate change, they do not represent human rights-based approach or rights-holder-centred remedy that was said to be the basis of the business and human rights regime. Nevertheless, it is noted that these cases might be beneficial for the purpose of challenging the climate change contribution of non-Carbon Majors, since it might be difficult to show the causal link between a bank's investment portfolio and adverse impacts on health or right to life by the means of tort law. This will be explained in the next section.

4.2.1. Tort law: potential and limitations

The third category of second wave cases consists of tort law claims that aim to compel corporations to take climate action. In addition to demanding compensation, tort law is also being used to seek court-ordered emission reduction commitments. An illustrative case comes from New Zealand: the case of *Smith v Fonterra*.[329] The plaintiff Mr Smith, being of indigenous Ngāpuhi and Ngāti Kahu descent, brought a claim against seven large greenhouse gas emitters. Mr Smith alleged that defendants' business activities have contributed, and continue to do so, "to dangerous anthropogenic interferences with the climate system".[330] Mr Smith claimed that

[324] Setzer and Byrnes (n 87) 20.
[325] ibid 21.
[326] *People of the State of New York v Exxon Mobil Corp* [2019] New York Supreme Court 452044/2018.
[327] ibid.
[328] ibid.
[329] *Smith v Fonterra Co-Operative Group Limited* [2020] High Court of New Zealand CIV-2019-404-001730, 419 NZHC.
[330] ibid para 8.

rising sea levels that are caused by climate change will result in loss of his family land that has physical as well as cultural and spiritual significance.[331] Furthermore, climate change will damage customary resources, interfere with traditional livelihood practices and have adverse health impacts to which the Māori community he claims to represent is particularly vulnerable to.[332] Hence, he alleged that this constitutes negligence and public nuisance, and that the companies owe a novel duty to cease contributing to damage to the climate system.[333]

To succeed, this case had to fulfil the tort law requirements, i.e. prove damage, breach of duty of care and demonstrate causal linkage. More particularly, for proving public nuisance, Mr Smith had to have suffered ""special damages" over and above that suffered by other members of the public".[334] These damages must be caused by an unlawful act.[335] For the purpose of liability for negligence, the defendant parties must have owed a legal duty of care to the plaintiff, harm must be caused by the breach of duty, and there must be an element of proximity.[336]

The first two tort claims – private nuisance and negligence – were rejected by the Court. In relation to public nuisance, the Court stated that the damages claimed by Mr Smith were neither particular nor direct,[337] although Mr Smith claimed that he belongs to a group to whom the risk is greater.[338] The effects of climate change were not particularly adverse on the plaintiff but manifested similarly on many others.[339] Therefore, the indigenous populations' vulnerability argument did not constitute a more particular damage. Moreover, the emissions are not a result of an unlawful activity, a feature crucial for establishing private nuisance.[340] It is interesting to note that the latter feature was not a barrier to remedy to rights-based climate litigation against States.

Likewise, the Court did not find a breach of duty of care as the damages were not reasonably foreseeable.[341] Although the asbestos litigation has been suggested as a precedent for climate litigation, as discussed above, the High Court of New Zealand explicitly denied the analogous nature of the claims. In fact, the Court directly discussed the precedent of *Fairchild v Glenhaven* and found that these two cases were not analogous. The Court concluded that due to the fact that Mr Smith did not assert scientific uncertainty as was the case in *Fairchild.*[342] Instead, the Court interpreted Mr Smith's claims as asking "to treat each defendant's contribution as being the causation in fact of the damage claimed".[343] However, the Court rejected this assertion as Mr Smith was not able to prove that any of the defendants had "materially contributed to climate

[331] ibid para 10.
[332] ibid.
[333] ibid paras 10–16.
[334] ibid para 58.
[335] ibid.
[336] ibid para 74.
[337] ibid para 62.
[338] ibid para 90.
[339] ibid para 62.
[340] ibid para 68.
[341] ibid para 81.
[342] ibid para 88.
[343] ibid.

change".[344] Therefore, the *Fairchild* precedent was not applicable. Although another precedent has been developed allowing for a proportionate and not joint and several liability, this option was also rejected since the Court did not think it was possible to "determine each defendant's historic emissions, or the extent of climate change effects that each defendant's contribution to date to global greenhouse gas emissions has caused".[345]

If the case was brough against the Carbon Majors whose historic emissions have been quantified in the Heede report, the Court might have confirmed the applicability of the *Fairchild* precedent. Nevertheless, the other challenges regarding proximity and particular duty of care would have remained due to the legal nature of the actions and limited knowledge of attribution.

The case indicates that litigants are still struggling to prove causality and proximity needed for traditional tort liability, regardless of the alleged new scientific, legislative or discursive context.[346] Therefore, the innate features of tort law liability are limiting receival of remedy.[347] These features might also warrant caution by the Court not to open up floodgates to litigation. In *Smith v Fonterra,* the Court said: "to recognise a duty of care would be to expose the defendants to an undue burden of legal responsibility, way beyond their contribution to damaging global greenhouse gas emissions".[348] This illustrates the challenge posed by the delocalised nature of the harm as well as the paradoxical volume issue.

Nevertheless, the alleged new discursive context might have inspired the Court to admit Mr Smith's third claim. The Court was not willing to disregard the argument that there might be a novel duty emerging as a result of evolution in tort law and developments in climate science.[349] Therefore, a novel duty of care might become a basis for tort liability.

However, even if the novel duty is accepted, courts may be reluctant to order a desired remedy. Mr Smith sought a declaration admitting the duty which the Court saw as a possibility of remedy. However, in regard to the second remedial demand by Mr Smith – injunction requiring all defendants to reduce their emissions from their activities to net zero by 2030[350] – the Court took a more cautious approach. The Court said that it may be "all but impossible to injunct the activities of any particular defendant as sought".[351] It was explained that such a remedy would require the Court to go beyond its mandate. For instance, the Court would have to apply a methodology to decide gross emissions from each defendant and to select another methodology to compare the effects of other greenhouse gases with carbon dioxide effects. Likewise, responsibility for supply chain emissions must be determined, as well as overall trajectory for the period between 2020 and 2030.[352]

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[344] ibid.
[345] ibid.
[346] Emmeline Rushbrook and Hannah Bain, 'Climate Change Litigation – Expect the Unexpected' (*Russell McVeagh*, 10 March 2020) <https://www.russellmcveagh.com/insights/march-2020/climate-change-litigation-expect-the-unexpected> accessed 10 May 2021.
[347] Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142) 435.
[348] *Smith v Fonterra* (n 329) para 95.
[349] ibid para 103.
[350] ibid para 15.
[351] ibid para 106.
[352] ibid para 107.

Moreover, the Court stated, in relation to the public nuisance claim, that due to the delocalised nature of the harm as well as the relative insignificant volume of emissions by the defendants, the sought relief will not be able to prevent the damage that Mr Smith claims will occur.[353] Therefore, the Court analysed the remedial effects by looking at the direct connection between the defendants' actions and the resulting effect.

This is in direct contrast with the reasoning of the ordering of remedy in rights-based climate litigation against States. In *Urgenda,* the Court disregarded the relatively insignificant effect of the emissions reductions by the Netherlands, as well as the uncertainties regarding attribution. Hence, the Netherlands was required to take the appropriate steps due to human rights obligations owed to the residents not because of the absolute effect the reductions were to have on the residents of the Netherlands.

The next section will analyse whether human rights obligations could supplement tort law and articulate a basis for a novel duty of care in claims against corporations.

4.2.2. Rights turn in private climate litigation

Rights-based climate litigation against corporation that intends to achieve emission reduction is currently not well-developed which is why a significant number of legal uncertainties exists. In fact, only two rights-based cases in a judicial mechanism and one launched before a quasi-judicial mechanism could be identified. All three complaints are aiming to change the conduct of Carbon Majors. The two lawsuits, namely *Milieudefensie et al. v Royal Dutch Shell plc.* (hereafter: *Milieudefensie v Shell)*[354] and *Notre Affaire à Tous et al. v Total* (hereafter: *Notre Affaire à Tous v Total)*[355] will be discussed in this chapter. The third petition, the so-called Carbon Majors Inquiry,[356] falls in the scope of the next chapter. Yet, at this point, it is important to note that the Inquiry has inspired subsequent litigation and clarified some of the connections between business and human rights regime and climate change, namely that Carbon Majors are potentially liable for climate change impacts.[357]

To give a brief introduction to the cases, in 2019, the Dutch environmental NGO Milieudefensie together with co-plaintiffs[358] initiated a lawsuit against Royal Dutch Shell alleging that Shell has breached its duty of care obligations under national law and international human rights

[353] ibid para 63.
[354] *Milieudefensie et al v Royal Dutch Shell plc* (application) [2019] District Court of the Hague 90046903.
[355] *Notre Affaire à Tous et al v Total* (application) [2020] Nanterre Civil Court. The report on global trends in climate litigation highlights the case of *Milieudefensie v Shell* under the second polycentric governance type of cases on the grounds that the case challenges the "inconsistency between discourse and action; see: Setzer and Byrnes (n 87). Indeed, the Dutch NGO argues that Shell's public commitments to the Paris Agreement and the UNGPs are inconsistent with their emission levels. Yet, I would argue that this is still a strong human rights-based case since the plaintiffs explicitly argue that "Shell's business model poses a threat to the climate goals of the Paris Agreement. Shell is violating its legal duty of care and is endangering human rights and lives. Shell is therefore acting unlawfully."
[356] 'In Re Greenpeace Southeast Asia and Others' (*Climate Change Litigation Databases*) <http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 12 May 2021.
[357] The Commission on Human Rights of the Philippines final report has not been published yet. For more information on the proceedings see: ibid.
[358] The co-plaintiffs are ActionAid NL, Both ENDS, Fossielvrij NL, Greenpeace NL,Young Friends of the Earth NL, Waddenvereniging and over 1700 individuals.

obligations, particularly under art 2 and art 8 ECHR.[359] The breach occurred due to Shell's contribution to climate change. The similarity with the *Urgenda* case is straight-forward. In fact, plaintiffs directly aim to extend the arguments made against the State to private corporations. The remedial demands are also mirroring the ones in the case against the Netherlands since they wish to achieve linear CO2 emissions reductions; yet, the request for an injunctive relief is more detailed: Shell is requested to reduce emissions by 45% by 2030 compared to 2010 levels and to zero by 2050. The plaintiffs argue that these targets are in line with the Paris Agreement.[360] The District Court of the Hague is expected to release their decision on 26th May 2021.

The case of *Notre Affaire à Tous v Total* is brought by four French NGOs and more than a dozen local governments against the French Carbon Major Total.[361] This application relies on the obligations that large corporations belonging to the jurisdiction of France have by virtue of the Duty of Vigilance Law.[362] To briefly recap, the Duty of Vigilance Law introduces an obligation to conclude human rights and environmental due diligence plans. Large companies to whom the law is applicable are required to create a vigilance plan that follows the steps of the UNGPs. In the plan, businesses must identify and seek to mitigate risks that could the operations of the company and/or companies they control might directly or indirect cause.[363] The Duty of Vigilance Law mentions that the risks could be to human rights, fundamental freedoms, the environment or public health[364] unlike the UNGPs that explicitly cover only human rights impacts.

The applicants in *Notre Affaire à Tous et al. v Total* claim that Total's current vigilance plan has failed to adequately disclose climate risks resulting from their activities, as well as to take mitigation measures that are in line with the Paris Agreement.[365] The plaintiffs are seeking an injunctive relief in which the Court would force Total to issue a new vigilance plan that correctly identifies the climate change risks caused by the emissions of the goods and services that Total produces. Secondly, Total should identify risks according to the IPCC special report released in 2018; and thirdly, the new vigilance plan should include mitigation measures that align with the climate goals of the Paris Agreement.[366]

Corporations within the scope of the Duty of Vigilance Law would be liable when it defaults on their obligations. It could be done by omission to conclude a vigilance plan or by failure in its implementation.[367] The law, however, does not introduce a specific liability mechanism for business-related human rights violations but the cases will be decided by general tort liability

[359] *Milieudefensie v Shell* (n 354).
[360] ibid 55.
[361] The NGO plaintiffs are Notre Affaire à Tous, Sherpa, Zea, and Les Eco Maires.
[362] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[363] ibid.
[364] ibid.
[365] *Notre Affaire à Tous et al v Total* (n 355).
[366] ibid para 1.4.2.
[367] European Coalition for Corporate Justice, 'French Corporate Duty of Vigilance Law' <https://vigilance-plan.org/wp-content/uploads/2019/06/2018-FAQ-in-English.pdf> accessed 10 May 2021.

route. Thus, the decision of liability will be taken based on tort law features of damage, breach of duty and causal linkage.[368]

The case against the French oil producer Total is still ongoing. Yet, a first victory has already been achieved. The Nanterre civil court rejected the Total's objection to the Court's jurisdiction. Total had claimed that the case should have been brought before a commercial court.[369] This is a commendable decision since another case against Total, challenging the company's oil project in Uganda, was dismissed by the same court only in January 2020.[370] This could be an example of how a discursive context can benefit a case. It has been speculated that the Nanterre court was inspired by the zeitgeist in France. Namely, in parallel to corporate action, Notre Affaire à Tous is also challenging the mitigation actions of France; the case has been called a 'case of the century'.[371]

4.2.3. Limitations and possibilities for mitigation-related remedy

Both of these cases request mitigation-related demands in order to achieve direct regulatory effect based on human rights arguments, responsibilities and obligations. Although the French case is based on specific due diligence obligations that has been the preferred method to ensure the corporate responsibility to respect human rights under UNGPs, it still relies on traditional tort liability regime. Can human rights arguments add value in these contexts? To what extent can these arguments result in the desired remedy?

4.2.3.1.Damage

Human rights arguments have a potential in relation to proving damage (i.e. interference with human rights enjoyment) since human rights law imposes less stringent burden of proof requirements in comparison to tort law.[372] Furthermore, the third chapter demonstrated that the business and human rights regime is able to incorporate harm that results from broader impacts than classic violations. The legal nature of emissions was a barrier for proving private nuisance in *Smith v Fonterra.*

The adverse effects that climate change has on human rights has now been widely accepted, as demonstrated in the first chapter. Thus, the potential infringement can be established rather easily by now, especially as human rights law does not require adverse impacts to be particularised like under classic tort obligations.[373] The applicants in the cases of *Urgenda,* and *Youth for Climate Justice* provided compelling arguments to show the already existing and

[368] ibid.
[369] Lucy Chatelain, 'First Court Decision in the Climate Litigation against Total: A Promising Interpretation of the French Duty of Vigilance Law' (*Business & Human Rights Resource Centre*, 25 March 2021) <https://www.business-humanrights.org/en/blog/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law/> accessed 25 April 2021.
[370] ibid.
[371] Clothilde Baudouin, 'A Historic Decision in the Case of the Century: The French State Is Found Liable for Its Insufficient Climate Action' (*Notre Affaire à Tous*, 3 February 2021) <https://notreaffaireatous.org/pr-a-historic-decision-in-the-case-of-the-century-the-french-state-is-found-liable-for-its-insufficient-climate-action/#:~:text=In%20its%20Case%20of%20the,in%20reducing%20greenhouse%20gas%20emissions.> accessed 10 May 2021.
[372] Annalisa Savaresi and Jacques Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (1st edn, Cambridge University Press 2020) 83.
[373] ibid 80.

potential future impacts of climate change on the enjoyment of human rights. Both *Milieudefensie v Shell* and *Notre Affaire à Tous v Total* also rely on this *prima facie* evidence to prove potential harm.

4.2.3.2.Breach of duty

For the purpose of liability, the *prima facie* evidence is only useful if an applicant can substantiate a claim that a defendant had human rights obligations, whether positive or negative, with which they failed to comply with.[374] Litigants challenging the conduct of States have been tasked with proving that the States breached their duty to protect human rights by not taking adequate measures, i.e. not fulfilling their positive human rights obligations. What the litigants in the private climate litigation are claiming is that corporations have the duty to respect, i.e. not to infringe on human rights. However, as the chapter three discussion demonstrated, it is not a straight-forward matter to establish that corporations even have these obligations.

In the case of *Notre Affaire à Tous v Total,* the duty of the company to respect human rights and the environment has become part of the legal order of France. Therefore, Total as a large enterprise registered and operating in France is a subject to the Duty of Vigilance Law. The applicants argued that Total's activities are significantly contributing to climate change which imposes risks of serious damage to the environment,[375] human health and safety[376] and human rights and fundamental freedoms.[377] The Duty of Vigilance Law aims to prevent and mitigate precisely these three risk categories; therefore, the applicants argued that Total's vigilance plan must include measures to mitigate risks imposed by climate change. They further argued that the inadequate vigilance plan directly results in the risks of serious damage.[378]

It has been clarified that the Vigilance Obligations impose a standard of conduct and not a standard of outcome.[379] In relation to a harm caused by multiple actors, this interpretation is welcomed, especially concerning uncertainties of attribution. However, it is still not clear whether this obligation is able to achieve a remedy for climate change impacts. Interestingly, these doubts and uncertainties echo the observations of the third chapter. It was demonstrated that although UNGPs incorporate climate change impacts under the due diligence obligations, these impacts might not be justiciable. The next section will demonstrate the practical challenges in relation to causality that warrant this caution for regulatory effect.

In the case of *Milieudefensie v Shell,* the applicants are trying to extend the climate change-related human rights obligations of the State to private sector actors. In fact, the plaintiffs base their arguments on the same duty of care obligation used in *Urgenda.* However, in relation to Shell, the litigants refer to the duty as 'social duty of care'.[380] Interestingly, this wording reflects the non-binding status of 'corporate responsibility to respect' found in the UNGPs, as clarified

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[374] Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244, 249.
[375] *Notre Affaire à Tous et al v Total* (n 355) para 2.3.2.2.
[376] ibid.
[377] ibid para 2.3.2.3.
[378] ibid para 2.3.3.
[379] Stéphane Brabant and Elsa Savourey, 'A Closer Look at the Penalties Faced by Companies' [2017] International Review of Compliance and Business Ethics 2 <https://media.business-humanrights.org/media/documents/cc551474b8206d6a7b9c6a92c2a3fb280c881139.pdf> accessed 10 May 2021.
[380] *Milieudefensie v Shell* (n 354) para 516.

by Ruggie.[381] This non-binding status, however, does not infer legal liability without an additional legal obligation.

In the 205-page petition, the applicants employ creative means to prove that Shell can be ordered to reduce emissions based on existing legal obligations. As the Netherlands has not regulated the emission levels of private sector actors, one of their arguments relates to a duty of care obligations under Dutch law.[382] These obligations are being substantiated by international human rights instruments.

Similarly to *Urgenda,* the applicants utilise human rights obligations deriving from the ECHR. The applicants argue that "ECHR colours the duty of care which private individuals and legal entities have towards each other".[383] The applicants argue that the Convention obligations traditionally applicable to States shall have indirect horizontal effect on Shell due to the corporate power and influence Shell has[384] that thereby warrants "a similar duty of care to respect fundamental rights as the duty of care which the State is bound by".[385] The article 6:162 of the Dutch Civil Code[386] in which this duty of care is provided for is indeed an open standard that has a wide interpretation margin.[387] However, there is no precedent in either international law or jurisprudence recognising or suggesting that some corporations, by virtue of their size or influence, have similar human rights obligations as States.[388] As previously explained, States are the main duty-bearers in the current international order governed by international law. Even if the social expectations are translated into a legal duty, the expectations cannot be considered as extensive as States' duty to protect as States due to the current international order. For instance, the obligation to protect extends environmental harm regardless of the source, whereas the business and human rights regime only regulates the impact of corporations' own activities.

The applicants aim to rebut the difference in obligations by suggesting that the methods of interpretation applied by the ECtHR allows to apply ECHR obligations domestically to non-state actors. They claim that ECtHR often engages with soft law instruments in order to interpret the meaning of various State obligations.[389] For instance, the non-binding standards of the WHO

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[381] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (n 209).
[382] These duty of care obligations derive from the Kelderluik criteria. The applicants argue that that Shell's current actions and omissions can be regarded as unlawful endangerment, the consequences of which are the justification of a court order imposed on Shell to realise the emissions reductions that are minimum requirement (as an interim step) in order to be able to prevent dangerous climate change. *Milieudefensie v Shell* (n 354) para 516.
[383] ibid para 667.
[384] David Birchall discusses the role of corporate power in Birchall, 'Corporate Power over Human Rights' (n 256).
[385] *Milieudefensie v Shell* (n 354) para 668.
[386] 'Article 6:162 Dutch Civil Code' (*Stanford World Intermediary Liability Map*) <https://wilmap.stanford.edu/entries/article-6162-dutch-civil-code> accessed 20 April 2021.
[387] The applicants argue that the article has previously been interpreted in light of ECHR norms. *Milieudefensie v Shell* (n 354) para 667.
[388] The alleged influence that Shell has cannot be considered a basis for the responsibility to respect in the UNGPs. John Ruggie has directly addressed this issue in 2008. He expressed concerns over anchoring corporate responsibility in the notion of influence as it would impose an undue burden on corporate entities. UN Human Rights Council, 'Clarifying the Concepts of "Sphere of Influence" and "Complicity". Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*' (2008) UN Doc A/HRC/8/16 paras 13–14.
[389] *Milieudefensie v Shell* (n 354) para 715.

are used to interpret the meaning of art 8 ECHR.[390] Thus, the applicants argue that the non-binding UNGPs that enjoy similar authority to WHO standards could be also considered for interpretation.[391] Indeed, ECtHR often supplements the meaning of Convention rights and obligations with other human rights mechanisms as also requested by the applicants in the case of *Youth for Climate Justice.*[392] However, in this case, the plaintiffs are not asking for the Court to interpret the meaning of the obligation in light of an international instrument but asking for a domestic court to extend the applicability of the ECHR to non-state actors based on a non-binding international law instrument.

Lastly, the applicants argue that the duty of care includes the principles of the UNGPs since Shell has embraced these Guidelines publicly, as well as for the fact that Shell has had that indirectly led to the creation of the UNGPs.[393] It is not difficult to remain sceptical about this argumentation on the applicability or legal strength attributed to the UNGPs. Shell's conduct in the past cannot be a basis for an implicit assumption that a non-binding instrument has special binding status vis-à-vis Shell in the future. In addition, Shell's public commitment is reflective of the social expectations towards the company which cannot infer legal liability.[394] To bring an anecdotal analogy, Shell has similarly supported the fulfilment of the UN Sustainable Development Goals.[395] Yet, it would be unreasonable to hold Shell liable if the 17 Goals, including goals like eliminating poverty and achieving gender equality, will not be reached by 2030.

The analysis of the arguments made in *Milieudefensie v Shell* clearly depicts the criticism of the wording of the UNGPs that was highlighted in the third chapter. Deva argued that the deliberate non-binding language indeed complicates the legal concretisation of corporate responsibility which can be inferred also from the case against Shell.

4.2.3.3. Causal link

Even if a duty of care in relation to preventing climate change is confirmed based on either specific due diligence obligations or invoking international human rights standards, the challenge of causation remains very relevant.

In the case against Shell, the applicants did not argue that Shell has single-handedly caused climate change nor that the future emissions of Shell are the sole cause of described danger. Instead, the applicants argue that the volume of the emissions makes a "nonnegligible or even substantial contribution to the increase of CO2 levels of emissions".[396] Therefore, the applicants consider that Shell's emissions are unlawful, and argue that Shell is "liable for the shared responsibility for dangerous climate change".[397] It is potentially easier for Milieudefensie et al. to establish these facts compared to Mr Smith since the applicants rely on the Heede report that

[390] ibid.
[391] ibid.
[392] The Portuguese applicants asked the Court to consider the Convention rights in conjunction with the Paris Agreement and Convention on the Right of the Child.
[393] *Milieudefensie v Shell* (n 354) para 715.
[394] This was established in the previous chapter.
[395] 'UN Sustainable Development Goals' (*Shell*) <https://www.shell.com/sustainability/our-approach/un-sustainable-development-goals.html#iframe=L3dlYmFwcHMvc2hlbGwtc2RnLw> accessed 12 May 2021.
[396] *Milieudefensie v Shell* (n 354) para 509.
[397] ibid.

demonstrated the historic emissions levels of Shell.[398] This is also the case for Total that is one of the investor-owned Carbon Majors whose emissions accounted for 21.7% of total global emissions,[399] of which nearly 1% can be attributed to Total. Thus, it might be more feasible for the applicants of these cases to show the material contribution of the defendants and to build a liability argument than in the case of *Smith v Fonterra.*

These arguments, however, play a different role than the arguments made in *Urgenda* or *Youth for Climate Justice*. In the litigation against States, the absolute volume of emissions was not invoked as the basis for a breach of human rights obligations. Rather opposite, the Supreme Court of the Netherlands found a breach of duty of care based on human rights obligations despite of the insignificant absolute emission levels of the Netherlands. Yet, since corporations do not have a duty, or even responsibility, to protect human rights which would require to adopt relevant measures, their liability is dependent on the actual effects of their activities on human rights. This is indeed the requirement for the cause and contribution elements that warrant remedial responsibility under the UNGPs as explained in the third chapter. It explains why the volume of emissions becomes more relevant in the cases against Carbon Majors. The volume of emissions is also pertinent for tort liability that is the only available judicial route applicants can currently take. The importance of determining the company's emissions volume was also mentioned in the case of *Smith v Fonterra.*

Nevertheless, even though the total historic contributions of Shell and Total are known, it is not certain whether these levels of emissions exceed the level when emissions qualify as unlawful or nonnegligible. The third chapter discussed the remedial responsibility obligations of Carbon Majors (and financial institutions) that could be inferred from the UNGPs. It was concluded that a single corporation could probably not be found to have caused the adverse impacts resulting from climate change. Although the notion of contribution was said to be applicable in these cases, a level of causality is still required.[400] Yet, as mentioned, the UNGPs do not give guidance on what would be a causal link that extends 'beyond trivial or minor', nor is any other international or national regulation setting limits to greenhouse gas volumes. Attribution science could play a significant role here but is not currently adequate enough to be able to assist. Likewise, State regulation that restricts carbon emissions could be of high importance in determining the causal link for contribution.

Furthermore, the Heede report indicates Carbon Majors' past emissions but does not estimate the absolute contribution of future emissions. These are also dependent on the behaviour of other emitters. However, for example, under the tort liability in France, courts will have to evaluate whether a breach of the legal obligations caused the environmental or human rights harm, while keeping in mind other relevant factors.[401]Also, the courts must assess whether adequate implementation of the vigilance obligations would have managed to prevent the

[398] ibid 548.
[399] Heede (n 62).
[400] UN Office of the High Commissioner for Human Rights, 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (n 278) 5.
[401] Brabant and Savourey (n 379) 3.

harm.[402] These assessment requirements might make it difficult to conclude that non-compliance with the duty of care or vigilance obligations have caused the foreseeable harm.

As continuously mentioned, climate change is a harm produced by a multitude of emitters. Hence, it is possible that any tort liability regime will have a similar conclusion as in *Smith v Fonterra.* Namely that even if the vigilance plan was adequate and in line with the Paris Agreement, it will not necessarily prevent the damage from occurring. Thus, the causal link between the activities of Total and risks to human rights, fundamental freedoms and the environment might not be sufficiently clear.

It is important to re-emphasise that these causation and attribution aspects were not relevant in the climate litigation against States as the existing human rights obligation to take appropriate measures was not dependent on the cause or contribution element. It was enough for the applicants in *Urgenda* to demonstrate the potential adverse impacts on human rights that automatically warrant responsibility to take measures, regardless of the source of the harm. Yet, tort liability depends on the actual contribution of the actor in question, even in relation to a specific legal duty to respect human rights. It illustrates the unsuitability of these liability mechanisms, as well as limitations of the respect obligation.

4.2.4. Direct effects: Receival of remedy

It was said above that the second wave of litigation is motivated by the assumption that successful litigation can achieve significant global emissions reductions. For this assumption to materialise, the litigation against corporation must result in direct regulatory effects, i.e. the Courts must order a mitigation-related remedy.

Due to the many legal uncertainties discussed in relation to duty of care and causation, as well as the continued dependence on tort liability, it is rather unlikely that international human rights can facilitate the establishment of liability, especially in the case against Shell. Even if the social duty to respect human rights is translated into legal obligations in the case against Shell, the previous chapter demonstrated that the Pillar III of the UNGPs does not accommodate remedy for large-scale impacts such as climate change.[403] In fact, this was the conclusion of the above-mentioned Carbon Majors Inquiry: international human rights law does not currently impose legal liability on Carbon Majors.[404]

For the sake of drawing out hypothetical scenarios, can the courts fulfil the request for injunctive remedy if the arguments of the applicants in *Milieudefensie v Shell* and *Notre Affaire à Tous v Total* are accepted? This is rather unlikely in the case of *Milieudefensiev Shell;* yet, could be possible in the case against Total.

Milieudefensie et al. requested the Court to order Shell to achieve a linear reduction of emissions that are associated with their business activities by net 45% by 2030, net 72% by 2040 and by net 100% by 2050 compared to 2010 emissions levels.[405] In *Urgenda,* the

[402] ibid.
[403] Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142).
[404] 'In Re Greenpeace Southeast Asia and Others' (n 356).
[405] *Milieudefensie v Shell* (n 354) para 851.

injunctive remedy was based on the State's duty to take appropriate measures. The necessary measures were substantiated by scientific consensus claiming that 25-40% emission reduction levels must be achieved by 2020 to protect against dangerous climate change. The Supreme Court argued that the State had already committed to these measures and their role was to enforce the commitments.[406]

However, it is not clear what role companies have to play individually to achieve a specific emission reduction target. Thus, the Court would have to decide whether the emissions reduction trajectory proposed by the plaintiffs is the proper remedy for the breach of duty of care. This is also relevant in the case against Total in which the applicants are asking for the Court to order a remedy that requires Total to review their vigilance plan in a way that is in line with the Paris Agreement. That would mean that emissions reductions by Total have to be put in context according to a reliable methodology. The applicants in *Youth for Climate Justice* proposed a methodology that could assist here. They suggested the Court to use a tool developed by Climate Action Tracker for the purpose of determining a 'fair share' of emission reductions. Could this methodology be applied vis-à-vis Shell and Total ?

There is one obvious objection. The methodology is not universally recognised methodology but merely a contribution by a private organisation. Secondly, even if the methodology was adopted under the UNFCCC, the applicability of this methodology is very complex vis-à-vis corporations since there is not a limited number of greenhouse gas emitters. It will be difficult to explain which of these companies have to be included due to the interdependency of market actors in the greenhouse gas emission 'supply chain'. Thus, it seems to be easier to agree with Shell's argument that the market rules should be regulated by State and are dependent on broader energy transition strategies which court-ordered mitigation would interfere with.[407] These defence arguments are similar to the argumentation by the High Court of New Zealand in *Smith v Fonterra* justifying why an injunctive relief is unlikely. Thus, the political doctrine argument vis-à-vis the conduct of third-party actors is extremely relevant. It would be surprising if the Court agrees with the trajectory proposed by the applicants.

Alternatively, the Carbon Majors could be asked to conduct proper due diligence but the targets and measures would be left up to the company itself to decide. However, this is unlikely to produce the requested results. In their defence, Shell argued that as a company, it is not their role to single-handedly change neither the demand nor the supply of fossil fuels as there are many additional fossil fuel providers.[408] Total has expressed similar sentiments; their spokesperson said in response to the lawsuit, "The solutions to responding both to the need for energy sources accessible to all, and to the challenges to climate change, require cooperation

[406] *Urgenda Foundation v The Netherlands* (n 119) para 8.2.2.
[407] Juliette Luyucks and Anne Hendrikx, 'Climate Change Actions against Corporations: Milieudefensie et al. v. Royal Dutch Shell Plc.' (*Clifford Chance: Business and Human Rights Insights*, 13 January 2021) <https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/climate-change-actions-against-corporations-milieudefensie-et-al-v-royal-dutch-shell-plc.html> accessed 16 May 2021.
[408] Stijn Franken, 'Observations from Climate Change Litigation' in Lise Smit and Ivano Alogna (eds), *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report* (2021) 37 <https://www.biicl.org/categories/business-and-human-rights> accessed 5 March 2021.

among the various stakeholders."[409] Moreover, the self-led reduction could lead to other rights infringements. According to the UN Special Rapporteur on extreme poverty, "Corporate actors cannot and will not, of their own accord, be capable of promoting a comprehensive approach that ensures the sort of economic and social transformation that climate change mitigation demands".[410]

However, the case against Total could have another type of regulatory effect. The case is an excellent opportunity to clarify the scope of the vigilance obligations as well as determine whether non-alignment with Paris Agreement is what determines the (un)lawfulness of the emissions of corporations.

4.2.5. Indirect effects

In relation to litigation against States, it was emphasised that the normative value and indirect effects of these cases should not be underestimated. Indeed, human rights practitioners have suggested that these cases can result in significant reputational risks which could lead to the loss of social license to operate.[411] Also, as previously mentioned, indirect effects include financial damages either due to costs of the litigation or even due to losses in stock prices. However, event studies that verify the effect on stock prices have not yet been concluded for climate litigation against Carbon Majors.[412]

Potentially the most promising and sustainable indirect effect that private strategic climate litigation can have is legislative action by the State. It has been argued that asbestos and tobacco related litigation drove legislative changes that regulated the market and introduced compensation funds that functioned as systemic remedy mechanisms.[413] Therefore, such regulations can also benefit remedy for adaptation or loss and damage as these compensation funds could be directed towards victims of climate change-related harm.[414] Therefore, articulating a connection between the actions of private entities and human rights harm could result in regulatory action as was the case for litigation about asbestos and tobacco-related impacts.

4.3.Concluding remarks

The chapter clearly demonstrated the unsuitability of tort liability for the purpose of achieving mitigation-related remedies. It was also shown that the human rights framework provides very little additional input for the purpose of establishing liability, thereby not being able to replicate the promising practices that have been seen in the litigation against States.

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[409] David Vetter, 'This French Lawsuit Is Making Oil Companies Nervous' (*Forbes*, 30 January 2020) <https://www.forbes.com/sites/davidrvetter/2020/01/30/this-french-lawsuit-is-making-oil-companies-nervous/?sh=7d464d5b2fc6> accessed 20 May 2021.

[410] UN Human Rights Council, 'Climate Change and Poverty. Report of the Special Rapporteur on Extreme Poverty and Human Rights*' (2019) UN Doc A/HRC/41/39 para 68.

[411] This argument was made by Tessa Khan during the UN Forum on Business and Human Rights (n 187).

[412] Setzer and Byrnes (n 87) 25.

[413] Ganguly, Setzer and Heyvaert (n 305) 858.

[414] David Birchall has proposed an idea to set up a Trust Fund for Victims of Climate Change. See more Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142).

For such claims to succeed, States must fulfil their Pillar I and Pillar III obligations. Since the legislative developments in France appeared to offer a more promising opening for enforcing climate change-related human rights obligations of Carbon Majors, it clearly shows that business conduct must be regulated in a way that protects human rights from climate change-related impacts. Alternatively, States could regulate the emissions levels of Carbon Majors in order to have an adequate standard of measurement for the due diligence obligations.

However, equally relevant for effective preventative remedy is a liability regime that is able to accommodate large-scale impacts as tort liability does not appear suitable. However, such liability regime might be politically and practically unfeasible, especially due to the justiciability issues discussed in chapter III.

In this context and continuous legal uncertainties, it is crucial to discuss other business and human rights regime's remedy mechanisms that could assist in relation to large-scale impacts.

5. Non-judicial remedies of the business and human rights regime

This chapter will delve into a discussion on the second strategy to achieve accountability that was suggested during the 8th Annual Forum on Business and Human Rights, namely the non-judicial and non-coercive route.[415] In light of the inappropriateness of the judicial mechanisms to achieve direct regulatory effects, the role of non-judicial mechanisms (NJMs) will be explored. Could these mechanisms of the business and human rights regime prove a useful contribution to climate action?

This chapter will firstly outline the role and suitability of NJMs to address climate change. The second part of the chapter will analyse two NJMs that have been utilised for the purpose of climate action. The chapter aims to demonstrate that NJMs have a significant potential to address issues that might not be considered justiciable, and to produce forward-looking remedies.

5.1.Non-judicial mechanisms

The business and human rights regime envisages a role for NJMs under Pillar III of the UNGPs. NJMs can be both State-based and non-State-based. The discussion here will focus on State-based NJMs. Alongside legal avenues, these non-judicial grievance mechanisms are meant to complete the State-based remedy system that provides access to justice for cases of business-related human rights abuse.[416] These mechanisms are meant to fill accountability gaps in situations in which judicial mechanisms cannot carry the caseload, judicial mechanisms are not required or when judicial mechanisms are not favoured by the rights-holders.[417] Practice has shown that there is a need for effective NJMs due to the number of barriers that rights-holders face when accessing judicial remedy mechanisms.[418]

NJMs are usually either adjudicative or mediation-based, or a combination of these approaches.[419] The adjudicative mechanisms carry out investigations to assess compliance with a relevant set of standards, and will release a statement accordingly.[420] For instance, National Human Rights Institutions can take on such an adjudicatory role.[421]

The second type – dialogue-based NJMs – requires participation of all parties to the dispute. The NJM will be a mediator in this process.[422] An example that is relevant for this thesis is the National Contact Point (NCP) system established under the OECD Guidelines.[423] Such mechanisms can result in effective outcomes since the solutions will be agreed upon by both

[415] UN Forum on Business and Human Rights (n 187).
[416] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 27.
[417] ibid, Principle 27 commentary.
[418] European Union Agency for Fundamental Rights (n 302).
[419] The commentary to UNGP 27 suggests another option – other culturally appropriate and rights-compatible process – that is not relevant for the purpose of the research question. UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56).
[420] Van Huijstee and Wilde-Ramsing (n 68) 476.
[421] Another example of an adjudicatory mechanism is the ILO Freedom of Association procedure.
[422] Van Huijstee and Wilde-Ramsing (n 68) 476.
[423] OECD Guidelines for Multinational Enterprises 2011 Edition para 11.

sides of the dispute. On the other hand, mediatory mechanisms are dependent on the parties' willingness to come to the table.[424] Nevertheless, employing dialogue-based mechanisms for the pursuit of climate action can be an answer to one particular criticism, namely that the Carbon Majors, as well as other relevant economic actors, remain the 'elephant in the room' – neglected agents in the global climate debate.[425] It would be important to include them in a debate and negotiations to achieve a true transformation to green economy.

5.2.Appropriateness of NJMs for remedy

For the purpose of the aim of the chapter, it is important to establish whether NJMs are appropriate avenues of remedy. In fact, it has been debated whether NJMs are able to provide remedies or if the mechanisms are designed for other purposes in the first place.[426] For example, the mediation-based NJMs created under the OECD Guidelines – National Contact Points – have occasionally expressed opposition to being considered a remedy mechanism.[427] The Canadian NCP has been adamant to call themselves a 'dialogue facilitating mechanism' or a 'forum of constructive dialogue'.[428] Likewise, the Danish NCP has previously refused to consider a part of a grievance because the complainants asked the respondent enterprise to provide remedy for alleged victims. The NCP rejected the request on the grounds that they cannot impose liability or penalties on enterprises.[429]

On the other hand, ample of literature has been dedicated to the argument that NJMs are meant to operate as remedy mechanisms.[430] This is even confirmed in the UNGPs where it is stated that NJMs are there to 'counteract' harm.[431] Furthermore, OHCHR has also categorised the outcomes of NJM processes as remedies.[432] Therefore, it is mostly accepted that one of the key functions of NJMs is to provide access to remedy.[433] This chapter will illustrate this function and the potential of NJMs.

5.3.Potential for large-scale impacts

Judicial mechanisms that were analysed in the previous chapter were deemed unsuitable for the purpose of providing remedy for large-scale human rights impacts due to various justiciability challenges. Therefore, before analysing specific NJMs, it is important to explore whether NJMs have potential to provide remedy for large-scale impacts such as climate change.

Firstly, NJMs have a unique role to provide a response to a situation that the judicial mechanisms cannot capture. The metaphor from human autonomy offered by Joseph Wilde-Ramsing,[434] describes it well: "Judicial mechanisms are the spine of the remedy system: they

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[424] Van Huijstee and Wilde-Ramsing (n 68) 476.
[425] Grasso and Vladimirova (n 178) 179.
[426] Van Huijstee and Wilde-Ramsing (n 68) 478.
[427] ibid.
[428] For example, see the Final Statement of *Bruno Manser Fund (BMF) v Sakto Corporation et al (Sakto)* (NCP Canada). Van Huijstee and Wilde-Ramsing (n 68) 478.
[429] *Clean Clothes Campaign Denmark and Active Consumers v PWT Group* (NCP Denmark) 4; Van Huijstee and Wilde-Ramsing (n 68) 479.
[430] Van Huijstee and Wilde-Ramsing (n 68) 479.
[431] UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 17.
[432] Van Huijstee and Wilde-Ramsing (n 68) 479.
[433] ibid 480; Miller-Dawkins, Macdonald and Marshall (n 67).
[434] J. Wilde-Ramsing is a senior researcher at OECD Watch where he specialises in corporate accountability.

form the core and handle the most serious cases. Without effective access to the spine, the system cannot survive and everything falls apart. On the other hand, NJMs are like the fingertips: they are more sensitive and can reach into places that are inaccessible to the spine, solving problems and providing remedy early and creatively before a major disaster occurs."[435] The previous chapter outlined the reasons why the 'spine', i.e. judicial mechanisms, is unable to provide adequate responses to climate change. Therefore, this metaphor could not be more fitting for climate change as we are in dire need for creative responses to avoid a true disaster.

In fact, the use of NJMs has soared over the past two decades, especially in regard to issues relating to environmental law,[436] which provides a valuable starting point for the discussion on achieving climate action-related remedy. The increasing awareness of the interconnection between human rights and environmental rights has not only warranted the need for urgent action but also demands for innovative and mitigatory solutions.[437] Thus, rights-holders and representatives have turned to alternative avenues of remedy. NJMs have also been attractive for complaints in areas which require scientific and technical input,[438] thus confirming the relevance for climate change.

Lastly, the judicial mechanisms are unlikely to order injunctive remedy as this would involve crossing their mandate and engaging in policy-making, especially as it might interfere with questions like energy demands and just transition. However, non-judicial mechanisms are either able to give recommendations on what these policies should be or reflect the capabilities and concerns that the companies have before making these changes. This potential will be reflected in the discussion about the NCP system.

Therefore, this description and the already existing preference of applicants to bring a complaint on environmental issues to NJMs could indicate that these mechanisms are better suited and adapted to provide remedy for climate change-related harm by businesses. On the other hand, David Birchall has criticised NJMs for some of the same reasons that make judicial mechanisms unsuited for climate change impacts. Firstly, similarly to judicial mechanisms, NJMs mostly assess individual responsibility for harm that a specific individual or group has suffered.[439] Secondly, Birchall claims that corporations might not agree to a remedial process since NJMs "exist in shadow of the norms of legal responsibility",[440] thereby making companies vulnerable for legal action in the future.

The suitability and effectiveness to ensure remedy will now be analysed in reference to the role and potential of the National Contact Point system and National Human Rights Institutions respectively.

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[435] Van Huijstee and Wilde-Ramsing (n 68) 471.
[436] OHCHR, 'Access to Remedy for Business-Related Human Rights Abuses' (Office of the UN High Commissioner for Human Rights, Accountability and Remedy Project II 2017) 5.
[437] ibid 7.
[438] ibid.
[439] Birchall, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (n 142) 436.
[440] ibid.

5.4.National Contact Point system

The National Contact Points system is the remedy mechanism of the OECD Guidelines. To briefly recap, OECD Guidelines are non-binding principles and standards that govern responsible business conduct in the OECD Member States.[441] All Member States to the Guidelines are required to set up a national NCP.[442] NCPs are the only State-based non-judicial grievance mechanisms built into a leading responsible business conduct standard.[443]

In addition to undertaking promotional activities related to the OECD Guidelines, NCPs are mandated to handle specific instances (i.e. complaints) in relation to the implementation of the Guidelines.[444] Representatives of rights-holders (e.g. NGOs or trade unions) can file a complaint to a national NCP regarding the implementation of the OECD Guidelines. The complaint is followed by an initial assessment by the NCP; if it is considered to merit further examination, the NCP will offer good offices to find a common solution to the issue.[445] For this purpose, NCPs can investigate a complaint, mediate the dispute resolution and publish a final statement. Ideally, the final statement is in a form of final agreement in which parties to the dispute agree on improvements of implementation of the OECD Guidelines. The NCP final agreements are not legally binding; yet, the system is premised on the consensus and dialogue approach, therefore, it is presumed a common final agreement will be implemented.[446] For this purpose, NCPs can offer guidance to corporations to implement the OECD Guidelines.[447]

NCPs are also equipped to follow up on the implementation of the final agreement or recommendations, even after the special instance has been closed.[448] During its 20 years of operating, the remedy system consisting of 49 NCPs has handled over 500 responsible business conduct complaints in over 100 countries and territories.[449]

5.4.1. Potential of NCPs

Based on these functions, what are the opportunities of NCP-mediated remedial processes to result in direct regulatory effect?

There are a number of non-climate related cases that have previously achieved forward-looking remedy outcomes that directly relate to the operation of the corporation. For example, in the complaint *Future In Our Hands v Intex* that concerned indigenous people's human and environmental rights, the Norwegian NCP's final statement included a number of recommendations regarding stakeholder consultations, disclosure requirements, transparency

[441] OECD Guidelines for Multinational Enterprises 2011 Edition para 11.
[442] ibid.
[443] The NCPs are also mentioned as an example of State-based grievance mechanisms in UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principle 25.
[444] OECD Guidelines for Multinational Enterprises 2011 Edition. Part II Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 1.
[445] ibid. Part II Procedural Guidelines.
[446] Stéfanie Khoury and David Whyte, 'Sidelining Corporate Human Rights Violations: The Failure of the OECD's Regulatory Consensus' (2019) 18 Journal of Human Rights 363.
[447] OECD Guidelines for Multinational Enterprises 2011 Edition. Part II Procedural Guidelines.
[448] OECD, 'National Contact Points for Responsible Business Conduct. Providing Access to Remedy: 20 Years and the Road Ahead' (OECD 2020) 14.
[449] OECD (n 448).

provisions and setting up a procedural level grievance mechanism.[450] The final statement also clarified the scope of responsible business conduct obligations,[451] thereby also achieving direct regulatory effects.

Direct regulatory effect was also achieved in a complaint concerning human rights abuses at a plantation in Argentina (*CEDHA, INCASUR Foundation, SOMO and Oxfam Novib v Nidera Holding B.V.*) brought to the Dutch NCP. After the mediation, the company agreed to strengthen its human rights policy and to formalise due diligence measures. Furthermore, the company allowed for the NCP to monitor its supply chain operations.[452] This has also happened in the specific instance against oil company SOCO handled by the UK NCP.[453] The complaint was brought due to oil exploration in a UNESCO World Heritage site. The NCP process resulted in a commitment by the company to terminate its oil drilling operations and to put in place processes for environmental impact assessments and human rights due diligence.[454] It is important to note that these final agreements have been agreed upon by both parties to the dispute as this is crucial for the implementation of these recommendations.

Furthermore, the follow-up function is an interesting potential of NCPs in relation to mitigation-related remedy. Namely, in *Smith v Fonterra,* the Court explicitly stated that it would be beyond the scope of their mandate to follow up on the implementation of the injunctive remedy. However, the NCP system is equipped with these powers.[455]

Forward-looking remedy outcomes have also been sought after in relation to climate change. Like the first wave of climate litigation, the first climate change-related complaints were rather unsuccessful. For instance, in the case of *Germanwatch v Volkswagen*, the NGO Germanwatch alleged that Volkswagen's products are climate damaging; thus, the company is violating various climate commitments.[456] The German NCP dismissed the case by claiming that the allegations were not within the scope of the OECD Guidelines.[457] Another climate-related complaint was rejected in 2011 by the Norwegian NCP. Norwegian Climate Network and Concerned Scientists Norway raised a complaint against Statoil claiming that by investing in oil sands in Canada, Statoil did not comply with the Environment chapter of the OECD Guidelines.[458] The Norwegian NCP concluded that it will not mediate the complaint since it concerned rather national policies of Canada regarding oil sands than the business activities of Statoil.[459] The challenges that can be inferred from these earlier climate complaints brought to NCPs concern the scope of protection (i.e. meaning of the obligations) that is provided to climate change effects, as well as the 'political doctrine' questions.

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[450] The applicants alleged that Intex had violated indigenous people's human and environmental rights. *The Future in Our Hands (FIOH) v Intex Resources ASA* [2011] NCP Norway.
[451] ibid; Scheltema, Martijn (n 67) 192.
[452] *CEDHA, INCASUR Foundation, SOMO and Oxfam Novib v Nidera Holding BV* [2012] NCP Netherlands.
[453] *WWF International and Soco International Plc* [2014] NCP UK.
[454] ibid.
[455] OECD Guidelines for Multinational Enterprises 2011 Edition. Part II, Commentary on the Implementation Procedures, para 36.
[456] *Germanwatch v Volkswagen* [2014] NCP Germany.
[457] ibid.
[458] Howard (n 186).
[459] *Climate Network and Concerned Scientists Norway v Statoil* [2012] NCP Norway.

Fortunately, the more recent climate-related complaints brought to NCPs have been more successful in interpreting the climate obligations of private sector actors. The last complaints have aimed to compel climate action from financial institutions. This is directly in line with the previously mentioned Paris Agreement's aim to direct financial flows towards green development. Being able to change the behaviour of more than Carbon Majors is a significant aspect of NCP potential and pertinent for climate action. It is improbable that traditional litigation can achieve this regulatory change since it will be even more difficult to establish duty of care and causal links for financial institutions. However, the following evidence will show the potential of NCPs to challenge the practices of financial institutions. Three such cases will be highlighted.

5.4.1.1.Dutch NGOs v ING

Firstly, a complaint was launched by Dutch NGOs against the ING bank. The NGOs Oxfam, Greenpeace, BankTrack and Milieudefensie claimed that the ING had not taken adequate measures to contribute to the Paris Agreement. Although the bank reported its own emissions, it did not disclose the emission levels of their investments, nor did the bank have emission reduction targets for their financial products. Therefore, the complainants claimed that ING Bank was not complying with its disclosure, environment and consumer interest obligations under the OECD Guidelines.[460] This complaint has been considered an important instance for the purpose of specifying corporations' obligations under the OECD Guidelines.

As a remedial outcome, the NGOs asked ING to publish the carbon footprint of its direct and indirect emissions, as well as commit to ambitious and measurable greenhouse gas emission reduction targets throughout their investments and loans.[461] The bank claimed that these requests cannot be fulfilled since that there is no proper methodology or international standards that could assist in linking their clients' emissions to global warming scenarios.[462]

However, the environment chapter of the OECD Guidelines specifically declares that scientific uncertainty could not be used as a reason not to take measures to prevent or mitigate damage.[463] Indeed, in the final agreement between the NGOs and ING bank, the Dutch NCP stated that even in the absence of internationally accepted methodologies, companies have a responsibility to "seek measures and disclosure of environmental impact in areas where reporting standards are still evolving",[464] as is the case with greenhouse gas emissions. Moreover, the NCP confirmed that OECD Guidelines require commercial banks to actively align their impacts with the Paris Agreement.[465] The ING agreed to adopt a methodology that could assist in target-setting. The bank also committed to reducing its "thermal coal exposure to close to zero by 2025 and refrain from financing new coal powered plants".[466]

It is significant that the efforts were connected to a specific international instrument and a scientific standard to limit global warming. Therefore, the complaint was able to achieve direct

[460] *Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie v ING* [2019] NCP Netherlands 2.
[461] ibid.
[462] ibid.
[463] OECD Guidelines for Multinational Enterprises 2011 Edition. Chapter VI art 4.
[464] *Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie v ING* (n 460) 5.
[465] ibid 5.
[466] ibid 5.

regulatory effects by clarifying the obligations of companies under the OECD Guidelines. Yet, this was not achieved based on human rights but on environmental obligations that are part of a responsible business conduct standards covered by the OECD Guidelines. Therefore, it could be that such integrated instruments that include environmental and human rights protection obligations might be better equipped to achieve the desired regulatory effect as they are able to incorporate the specific elements that these protected interests require; for example, address the need for a precautionary approach in the context of lack of scientific uncertainty.

Interestingly, the NCP did not decide whether the Bank's current policies were in compliance with the OECD Guidelines. This question was deemed unhelpful.[467] It could be asked whether this is a desirable approach as it avoids accountability of the corporation. Yet, it appears to achieve the principled pragmatism that the business and human rights regime relies on. In fact, the decision by the Dutch NCP might make some of the criticism toward NJMs partly redundant. As was mentioned, Birchall was sceptical whether corporations are willing to participate in these processes as it might indicate their potential liability. However, by not having to determine the compliance aspect, NCPs could better foster dialogue-based remedial processes and bring relevant stakeholders to the table. That could ensure that NCPs become an attractive mediation platform for climate-related complaints and achieve regulatory effects regardless of the justiciability challenges that the "super wicked" problem contains.

Furthermore, this allows to overcome difficult causality aspects that have previously hindered receival of remedy. Tara Van Ho analysed that the meaning of 'contribution' under the OECD Guidelines is the same as under the UNGPs, if not even requiring a stronger causal link than was merely 'beyond trivial'.[468] Therefore, it is commendable that the forward-looking remedies in the complaint against the ING Bank were achieved without having to deliberate on the compliance.

The final agreement between the NGOs and the ING bank also addressed the State. All parties called upon the State to take measures that would ensure reliable carbon emissions data and methodology for accounting emissions.[469] In relation to litigation, the indirect effect of incentivising regulation was mentioned. The NCP process can even more explicitly articulate specific policy needs and unclarities. Therefore, such alternative avenues of remedy can shape processes and developments of government policies in order to facilitate adequate responsible business conduct standards and policy coherence.[470]

Moreover, it appears that by clarifying the obligations of the OECD Guidelines, the Dutch NCP-led special instance has inspired similar actions elsewhere, indicating additional indirect effect.

5.4.1.2.Australian bushfire victims and Friends of the Earth v ANZ Bank

A similar complaint was launched in Australia against the ANZ Bank in January 2020.[471] Like the Dutch NGOs, the Australian bushfire victims and Friends of the Earth Australia claimed

[467] ibid 7.
[468] Van Ho (n 65) 7.
[469] *Oxfam Novib, Greenpeace Netherlands, BankTrack and Milieudefensie v ING* (n 460) 6.
[470] OECD (n 448) 1.
[471] *Friends of the Earth Australia et al v Australia and New Zealand Banking Group (complaint)* (NCP Australia).

that ANZ was breaching its obligations under the disclosure, environment and consumer interest chapters of the OECD Guidelines. They argued that as the largest the largest financier of fossil fuel industry in Australia, the Bank is not adhering to the Paris Agreement mitigation targets that were considered the standard of responsible business conduct in the complaint against ING.[472] The complaint is still under review but it is clear that the desired remedy aims at direct regulatory effect.

The applicants request that the ANZ adequately discloses their direct and indirect high risk greenhouse gas emissions. Also, ANZ should divest from fossil fuel industries.[473] Furthermore, the requests include a commitment to specific emission reduction targets that are in line with the Paris Agreement.[474] In the application, the complainants also ask for the Bank to undertake an analysis of all sectors they are financing.[475]

Although this complaint is not made on the basis of specific human rights arguments either, one of the provisions of the Guidelines that is invoked accounts for the impact of environmental risks on human health and safety.[476] The complaint confirms the potential of utilising non-judicial mechanisms provided under the business and human rights regime in order to achieve direct and indirect regulatory effects.

5.4.1.3.Indigenous Women and Divest Invest Protect v Credit Suisse

A third complaint against a financial institution was launched in January 2020 by the Indigenous women and Divest Invest Protect against Credit Suisse.[477] This complaint relies on both environmental and human rights obligations that arise from the OECD Guidelines.[478] The applicants raised the case due to the continued investments that Credit Suisse has made to the Dakota Access Pipeline and Bayou Bridge Pipeline developments. The NGOs claim that the bank has contributed to adverse impacts on indigenous peoples as well as the environment.[479] This complaint is ongoing.

These three complaints indicate the potential of NCPs to change the behaviour of non-Carbon Majors. However, no specific instances in which applicants claim non-compliance with environmental or human rights obligations have been launched against a Carbon Major. Therefore, it could not be concluded whether this potential applies to the fossil fuel industry as well. Financial institutions could be asked to reduce their (indirect) emission levels by, for example, directing financial flows to other sectors. However, requesting the same from fossil fuel corporations would directly challenge their business model. Although this change would

[472] ibid.
[473] ibid 15.
[474] ibid.
[475] ibid.
[476] Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage. OECD Guidelines for Multinational Enterprises 2011 Edition. Chapter VI Paragraph 4.
[477] *Indigenous women and Divest Invest Protect v Credit Suisse (complaint)* [2020] (NCP USA).
[478] OECD Guidelines for Multinational Enterprises 2011 Edition. Chapter IV, para 2 and 5; Chapter VI para 3.
[479] *Indigenous women and Divest Invest Protect v Credit Suisse (complaint)* (n 477).

be crucial for climate action, it will have to be seen whether NCPs could order these remedies from Carbon Majors.

5.5.National Human Rights Institutions

NHRIs adhere to the Paris Principles according to which their role is to advise government and other relevant State agencies on issues relating to human rights, promote and ensure adequate incorporation of international human rights law standards into domestic legislation, encourage their respective governments to ratify human rights treaties, carry out human rights education and operate as a partner to the United Nations.[480]

5.5.1. Potential of NHRIs

NHRIs can act as quasi-judicial bodies according to the Paris Principles.[481] This will allow these NHRIs to consider human rights complaints in individual situations. These quasi-judicial powers are relevant for promoting access to and facilitate the receival of remedies. Also, these functions can have preventative results. One of the aims of the process is to make recommendations to safeguard non-repetition of actions that infringe on human rights.[482] According to this interpretation of the potential quasi-judicial role of NHRIs, it can be concluded that these Institutions are adequate to facilitate mitigation-related remedies.

Although the Paris Principles do not explicitly mandate NHRIs to monitor the conduct of private actors, the UN General Assembly has stated that their mandate extends to all sectors.[483] Hence, the business and human rights regime has identified the specific role that NHRIs can play in relation to protection of human rights against business-related abuses. Firstly, under Pillar I of the UNGPs, the NHRIs are considered an important monitoring and advisory body. Their role would be to "identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced".[484] Furthermore, the NHRIs could also advise businesses on human rights issues.[485] These two roles can be of crucial importance considering the need for legislation that was highlighted in the fourth chapter.

Additionally, the UNGPs assign NHRIs another role under Pillar III. Namely, NHRIs are envisaged as another necessary State-based NJM.[486] The potential of these roles will be discussed in relation to a landmark petition brought to the NHRI of the Philippines.

5.5.1.1.Carbon Majors Inquiry

The so-called Carbon Majors Inquiry, that has inspired rights-based climate litigation as mentioned in the previous chapter, was initiated by Greenpeace Southeast Asia and other NGOs

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[480] UN General Assembly, 'Principles Relating to the Status of National Institutions (The Paris Principles)' (1993) resolution 48/134 para 3.
[481] UN General Assembly, 'Paris Principles' (n 480).
[482] Humberto Cantú Rivera, 'National Human Rights Institutions and Their (Extended) Role in the Business and Human Rights Field' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Limited 2020) 492.
[483] UN General Assembly, 'Resolution Adopted by the General Assembly on 18 December 2008: National Institutions for the Promotion and Protection of Human Rights' UN Doc A/RES/63/172 para 12.
[484] UN General Assembly, 'Resolution Adopted by the General Assembly on 18 December 2008: National Institutions for the Promotion and Protection of Human Rights' (n 483), Principle 3 commentary.
[485] ibid, Principle 3 and 23 commentaries.
[486] Cantú Rivera (n 482) 495; UN Human Rights Council, 'Guiding Principles on Business and Human Rights' (n 56), Principles 25 and 27.

against 47 investor-owned Carbon Majors.[487] This petition directly contradicts the criticism by Birchall that NJMs are only assessing complaints against individual actors.

The petitioners launched the petition due to the adverse human rights impacts that climate change and ocean acidification will have for the population of the Philippines. They asked the Commission on Human Rights to answer the question "whether or not the Respondent Carbon Majors must be held accountable – being the largest corporate contributors of greenhouse gases emissions and having so far failed to curb those emissions despite the companies' knowledge of the harm caused, capacity to do so, and potential involvement in activities that may be undermining climate action – for the human rights implications of climate change and ocean acidification."[488] It is notable that this petition relies directly on the UNGPs,[489] therefore, providing a basis to analyse the obligations or responsibilities arising from the business and human rights regime.

As an outcome of the petition, the applicants asked the Commission to investigate the human rights implications and violations of climate change and ocean acidification, as well as whether the fossil fuel producers have breached their responsibility to respect human rights.[490] Other requests relevant for the current paper included passing a recommendation to policy- and decision-makers to implement adequate corporate reporting standards that would include environmental human rights issues, as well as to develop an effective and rights-holder-centred accountability mechanism.[491] Furthermore, although none of the Respondent companies are registered in the Philippines, the Commission was requested to ask the Carbon Majors to submit due diligence plans laying out their mitigation and prevention measures. Lastly, the petitioners wished for the other States to play a role in prevention and remedy human rights impacts resulting from climate change.[492]

The Commission concluded their investigation in 2019 and announced its main conclusions. The Commission stated that Carbon Majors' contribution to climate change could make them liable for climate change-related human rights impacts. However, the Commission acknowledged that currently, no legal liability can be inferred from international human rights law; therefore, it is the responsibility of States to regulate the conduct of these corporations and to establish appropriate liability regimes.[493] The final report is yet to be published.

It is important to note that some of the main barriers that litigants are facing in a courtroom were not problematic in this Inquiry. Firstly, the case was brought against multiple Carbon Majors that belong to different jurisdictions. The jurisdictional element was not deemed a barrier. Furthermore, the Commission was able to articulate moral obligations that derive from international soft law instruments and did not have to rely only on legal duties. The previous

[487] *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* [2015].
[488] ibid 17.
[489] ibid.
[490] ibid 31.
[491] ibid 17.
[492] The petitioners also asked the Commission to "monitor people and communities acutely vulnerable to the impacts of climate change". ibid 31.
[493] 'In Re Greenpeace Southeast Asia and Others' (n 356).

chapter demonstrated that the lack of legal obligations is a barrier to achieve a similar result through judicial mechanisms.

Lastly, commenting on this Inquiry, A. Savaresi suggested that corporations' failure to take due diligence measures could amount to causality.[494] The previous chapter doubted whether this is a viable option within tort liability without a climate-specific due diligence obligation. However, seeing that the Philippines' Commission already confirmed that Carbon Majors could be seen held liable based on their moral obligations arising from the UNGPs, it suggests that similar conclusions could be made based on the business human rights regime by other quasi-judicial bodies as well. Moreover, one could even argue that these articulations may inform remedial responsibilities that arise from legal due diligence obligations. For example, French legal experts E. Savourey and S. Brabant suggested that the ambiguities regarding causality for non-compliance with Vigilance Obligations can be solved in reference to the UNGPs.[495] The discussion has previously shown that UNGPs themselves do not provide relevant guidance that would be specific to climate change-related impacts. However, conclusions by authoritative NHRIs could be useful to make these connections that applicants and Courts could rely on.

There are also other indirect effects that have already been noted. Such findings are important elements of indirect effects as they either urge the corporations to mitigate their effects or play into the polycentric governance aspect by changing the social norms and public opinion about these companies. For instance, A. Savaresi claims that the Inquiry has enhanced the visibility of a matter that needs further regulations, as well as put pressure on both States and Carbon Majors to do their part.[496] Thus, that petition clearly indicates the potential of NHRIs as a quasi-judicial mechanism to clarify Pillar II responsibilities of corporations and articulate the need for legislation on human rights ground in order to ensure rights-holder centricity in line with Pillar I obligations.[497] It confirms the advisory and adjudicative roles assigned to NHRIs in the UNGPs. Furthermore, the case has inspired other liability actions as already mentioned in the fourth chapter.

5.6.Limitations of NJMS

These above-mentioned effects and potential of the NJMs depend on whether the complaints are able to proceed in the first place. The business and human rights regime, particularly the UNGPs, assign NHRIs the role and responsibility to provide access to remedy for individuals adversely affected by business activities. However, it is not acknowledged that a number of NHRIs are domestically not mandated to receive or investigate complaints by individuals.[498] In a survey conducted on the powers of the NHRIs, only 10 out of 43 were found to have complaint-handling mandate for private matters. [499]

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[494] Annalisa Savaresi, 'Human Rights-Based Climate Change Litigation' in Lise Smit and Ivano Alogna (eds), *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report* (2021) 31 <https://www.biicl.org/categories/business-and-human-rights> accessed 5 March 2021.
[495] Brabant and Savourey (n 379) 3.
[496] Savaresi (n 494) 31.
[497] Cantú Rivera (n 482) 499.
[498] Surya Deva, 'Corporate Human Rights Abuses: What Role for the National Human Rights Institutions?' in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region* (Routledge 2011).
[499] ibid 241.

Although all NCPs are equipped with complaints-handling powers, the system has been criticised for the high overall rejection level. In 2019, more than one-third of the cases were rejected before any mediation.[500] This could partly be explained by flaws in the institutional design of the NCP system. As mentioned, all OECD Member States are obliged to set up an NCP. However, the Guidelines do not prescribe the exact design of these mechanisms. This has resulted in a varying quality and capacity of the system. The OECD released a report in 2020 outlining the successes and weaknesses of the remedial system. It was concluded that after 20 years of operating, many of the NCPs are still single-agency or inter-agency bodies that are incorporated into another governmental department.[501] In these cases, the NCPs often do not have expert staff, but are composed of representatives from these governmental departments, hindering the NCPs business and human rights-specific expertise.[502] Furthermore, these single- or inter-agency bodies suffer from budgetary constraints. For instance, 31 out of 49 NCPs lack a dedicated budget for the complaint-handling process.[503] However, the other types of NCP agencies, namely multipartite or especially expert-based, have much more potential top provide necessary mediation. Governments are, in fact, required to provide NCPs with adequate financial resources and relevant expertise. Therefore, lack of political will to strengthen the NCP system appears to be the root cause of the problem, not the potential of the system *per se*.[504]

Even if an NCP accepts to mediate a complaint, the process depends on the willingness of companies to engage. The reliance on this consensus- and dialogue-based approach has been a major criticism towards the NCP system.[505] However, a recent complaint brought to the Dutch NCP against Pluspetrol, a multinational oil and gas company in Latin America, suggests new developments. The complaint was filed by Peruvian Indigenous groups to demand remedy for the effects of a large-scale pollution caused by Pluspetrol's oil extraction. Although Pluspetrol refused mediation, the Dutch NCP accepted the complaint on 20th April 2021.[506]

Second important point of criticism relates to the doubts raised at the 8th Annual Forum on Business and Human Rights. As said, it was questioned whether corporations would make genuine changes without a legally binding decision.[507] The criticism is relevant for both the NCP system and NHRIs. Despite of the follow-up functions, NCPs have been criticised for lack of enforcement powers.[508] There are a number of examples where companies simply ignored the NCP-facilitated final agreement, although they had previously agreed to participate in the mediation.[509] Likewise, National Human Rights Institutions, as quasi-judicial bodies, have limited enforcement powers. Indeed, it will be difficult for the Human Rights Commission of the Philippines to enforce their recommendations for Carbon Majors, especially since none of

[500] OECD Watch, 'The State of Remedy under the OECD Guidelines' (2020) OECD Watch Briefing Paper 1.
[501] OECD (n 448) 12.
[502] ibid 38.
[503] *Launch Event: Report on 20 Years of NCPs as Grievance Mechanisms* (2020) <https://www.youtube.com/watch?v=q1PwYAY8FoY&feature=emb_title> accessed 6 January 2021.
[504] Khoury and Whyte (n 446) 369.
[505] Khoury and Whyte (n 446).
[506] *Indigenous Federations from Peru et al v Pluspetrol Resources Corporation BV* [2021] NCP Netherlands.
[507] Sarlième (n 297).
[508] Khoury and Whyte (n 446) 371.
[509] ibid.

the corporations are registered in the Philippines.[510] The fact that climate change is a transboundary harm also limits the effect the Commission's recommendations can have for the rights-holders.

5.7. The need to strengthen NJMs

Despite of some of the limitations of the NJMs, this chapter has demonstrated the important potential for NJMs to articulate forward-looking regulatory remedies for large-scale human rights impacts. By virtue of that potential, States should take proactive measures to strengthen the non-judicial mechanisms, as well as act on the recommendations posed by them.

A comprehensive research on the effectiveness of non-judicial grievance mechanisms concluded that their success often depends on more than adequate institutional design.[511] In fact, it is important to look at the ways these NJMs operate within a broader system. To ensure effective remedy processes and potential regulatory effect, the leverage of the NJMs must be increased.[512] For this, action by the State is crucial.

For instance, the role of NHRIs could be strengthen by ensuring that these institutions have complaints-handling powers. Furthermore, it is important that States follows the recommendations issued by NHRIs to guarantee that the institutions are not considered toothless. In regard to NCPs, John Ruggie and Tamaryn Nelson have alluded to ways how to increase the leverage of the NCP system. In addition to raising awareness about the remedy mechanism and strengthening its organisational capacity, States could also sanction corporations for non-cooperation with an NCP.[513] Although these measures to some degree depend on political will, States are required to ensure effective remedy avenues under international human rights law.

Indeed, States are obliged under international human rights law to provide for effective remedy mechanisms. This was confirmed in the UNGPs: "As part of their duty to protect against business-related human rights abuses, States must take appropriate steps to ensure through judicial, administrative, legislative or other appropriate means that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy".[514] The State's duty to protect human rights from climate change-related harm was confirmed in the second chapter. In addition to regulating the conduct of third parties, this duty also includes the need to provide effective remedy mechanisms to which strengthening the leverage and enforcement powers of the NJMs contributes to.

5.8.Concluding remarks

This chapter demonstrated that NJMs could not only be relevant but very valuable remedy mechanism of the business and human rights regime that contribute to the urgent need to take

[510] Savaresi and Auz (n 374) 260.
[511] Miller-Dawkins, Macdonald and Marshall (n 67).
[512] ibid 6–7.
[513] John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (Corporate Social Responsibility Initiative 2015) Working Paper No. 66 20–21.
[514] UN General Assembly, 'Resolution Adopted by the General Assembly on 18 December 2008: National Institutions for the Promotion and Protection of Human Rights' (n 483), Principle 25.

climate action. Compared to the available liability regimes, NJMs are better positioned and adaptable to offer adequate remedy options that correspond with the rights-holders' demands for climate action. NJMs have an excellent opportunity to inform the need for more State-led regulation and guidance, as well as produce forward-looking plans that corporations have agreed to. Beyond these effects, the discussion also showed that NJM processes can create public exposure of human rights issues that may lead to broader indirect effects.

6. Conclusion

The research undertaken in this thesis relied on the promising direct and indirect regulatory effects that rights-based climate litigation against States have achieved. Being inspired by the potential, this thesis aimed to analyse whether this success can be replicated vis-à-vis corporations. Thus, this thesis aimed to answer the following question: To what extent does the business and human rights regime provide adequate remedies to compel corporations to take climate action?

Throughout the analysis, significant weaknesses of the legal or even moral force that arises from the UNGPs were highlighted. Firstly, the UNGPs are voluntary guidelines; no legal liability can be inferred from the corporate responsibility to respect (Pillar II of the UNGPs). The Carbon Majors Inquiry conducted by the Human Rights Commission of the Philippines explicitly confirmed that. The lack of legal force is a significant barrier to adequate remedy. However, there are legislative developments (e.g. French Duty of Vigilance Law) that could change the legal force of the regime at least nationally. Domestic human rights due diligence obligations, especially when they include an environmental dimension, could increase the potential of the business and human rights framework to contribute to climate action. This was demonstrated by the analysis of the case *Notre Affaire à Tous v Total*.

Second limitation of the regime that hinders access to adequate remedies relates to the content of the obligations that the UNGPs articulate. Reflecting the current state of international human rights law, the UNGPs do not create new obligations but merely confirm the different 'obligations' that States and corporations have, namely protect and respect. The second chapter concluded that the reason for the successful 'rights turn' in public climate litigation was the nature of the human rights obligations that climate change warrants. The Supreme Court of the Netherlands confirmed in *Urgenda* that the protection of the right to life and right to private and family life oblige States to take proactive steps to mitigate the risks. Therefore, the remedy that human rights law can offer is not emissions reductions *per se,* but an enforcement of obligation to take measures to prevent human rights harm. Based on scientific consensus depicted in the IPCC reports, these obligations amount to the need to reduce emissions. Interestingly, for this obligation to be invoked, the State does not have to have caused this harm nor is this obligation particular to a particular group that must prove the adverse impacts they are experiencing. In this way, human rights arguments are able to overcome many legal and scientific challenges and uncertainties that are posed by this "super wicked" policy and remedy problem.

Even if the corporate responsibility to respect can be considered a legal obligation, the business and human rights regime does not prescribe equivalent obligations to corporations. The third chapter emphasised that the corporate responsibility to respect is a narrower obligation than a State duty to protect, although practical means such as human rights due diligence could ensure preventative effects. Yet, the human rights due diligence process as currently set out is not necessarily suitable for preventing contributions to dangerous climate change. The framework requires a strong causal link between the (potential) harm and the rights-holders. For instance, the due diligence measures are meant to be taken in relation to a specific affected group, not

more broadly towards the entire society as was the obligation of States. Secondly, the business and human rights regime requires the contribution to the harm to be 'beyond trivial'. The applicants in both *Milieudefensie v Shell* and *Notre Affaire à Tous v Total* relied on the Heede report to show the historic emission volumes of these Carbon Majors. Yet, due to the lack of scientific methodology and political will to enforce emission reduction targets, it is currently unclear whether these emission levels can be considered unlawful under tort liability.

Although the normative value of these cases cannot be underrated, the challenges that the rights-based cases are faced with mirror challenges that traditional tort claims have been struggling with (e.g. *Smith v Fonterra).* Therefore, the thesis can conclude that the business and human rights regime's judicial remedies are unlikely to replicate the success achieved against States. Hence, judicial avenues are more likely to produce indirect rather than direct regulatory effect.

Nevertheless, the already-mentioned legal developments could shift the conclusion. The case of *Notre Affaire à Tous v Total* will be a litmus test for the business and human rights regime. The Nanterre Court has an opportunity to clarify whether human rights and environmental due diligence obligations result in adequate remedies that can compel climate action. An affirmative decision will be a significant victory for the business and human rights regime, especially in light of the upcoming corporate responsibility proposal by the European Commission. It is anticipated that the human rights and environmental due diligence obligation will form a part of the Green Deal, thereby aiming to contribute to the carbon neutrality ambition of the EU. Furthermore, the EU upcoming proposal could learn from the broader challenges that traditional tort liability regimes impose, and design a liability regime that is more suitable for large-scale human rights impacts. The potential of the EU-wide directive will have to be analysed once it is adopted.

Meanwhile, climate action could be sought after through non-judicial mechanisms. The fifth chapter made the case for the appropriateness and potential of NJMs. The flexibility of these mechanisms to respond to issues that cannot be captured by judicial mechanisms or demand innovative solutions. For example, at the end of the mediation by the Dutch NCP, the Dutch NGOs and the ING Bank agreed to a final statement in which ING agreed to climate action commitments. In addition to providing forward-looking remedies, NJMs are also powerful avenues to call upon States to uphold their UNGP Pillar I obligations to regulate business conduct in relation to potential human rights harm (e.g. *Carbon Majors Inquiry).* Therefore, the non-coercive routes of remedy envisaged in the business and human rights regime could be very valuable for compelling corporations and States to tackle the "super wicked" problem of climate change.

Bibliography

International and Domestic Law Instruments

African Charter on Human and Peoples' Rights 1981 (Organisation of African Unity CAB/LEG/67/3 rev 5, 21 ILM 58 (1982))

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus Convention) (United Nations Treaty Series vol. 2161)

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950 (Council of Europe ETS 5)

Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (UN Doc FCCC/CP/1997/L7/Add1)

Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre

Paris Agreement 2015 (UN Doc. FCCC/CP/2015/19)

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) 1999

Rio Declaration on Environment and Development 1992 (UN Doc. A/CONF.151/26 (Vol I))

Stockholm Declaration on the Human Environment 1972 (UN Doc. A/CONF.48/14, at 2 and Corr.1)

United Nations Framework Convention on Climate Change 1992 (UN Doc. FCCC/INFORMAL/84)

UN Documents

Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change' (2018) UN Doc CEDAW/C/CG/37

Committee on the Rights the Child, 'General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*' (2013) UN Doc CRC/C/CG/15

UN Commission on Human Rights, 'PROMOTION AND PROTECTION OF HUMAN RIGHTS.' (2006) Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises∗ UN Doc E/CN.4/2006/97

UN General Assembly, 'Principles Relating to the Status of National Institutions (The Paris Principles)' (1993) resolution 48/134

UN General Assembly, 'Human Rights and Transnational Corporations and Other Business Enterprises. Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162

UN General Assembly, ‘Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment’ (2019) UN Doc A/74/161

UN General Assembly, ‘Resolution Adopted by the General Assembly on 18 December 2008: National Institutions for the Promotion and Protection of Human Rights’ UN Doc A/RES/63/172

UN Human Rights Committee, ‘General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, Right to Life’ (2018) UN Doc CCPR/C/GC/36

UN Human Rights Council, ‘Resolution 7/23. Human Rights and Climate Change’ (2008) UN Doc A/HRC/RES/7/23

UN Human Rights Council, ‘Clarifying the Concepts of “Sphere of Influence” and “Complicity”. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*’ (2008) UN Doc A/HRC/8/16

UN Human Rights Council, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (2009) UN Doc A/HRC/10/61

UN Human Rights Council, ‘Resolution 10/4. Human Rights and Climate Change’ (2009) UN Doc A/HRC/RES/10/4

UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) UN Doc A/HRC/17/31

UN Human Rights Council, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*’ (2014) UN Doc A/HRC/26/28

UN Human Rights Council, ‘Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse’ (United Nations General Assembly 2016) UN Doc A/HRC/32/19

UN Human Rights Council, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2018) UN Doc A/HRC/37/59

UN Human Rights Council, ‘Climate Change and Poverty. Report of the Special Rapporteur on Extreme Poverty and Human Rights*’ (2019) UN Doc A/HRC/41/39

UN Office of the High Commissioner for Human Rights, ‘Human Rights and Transnational Corporations and Other Business Enterprises. Human Rights Resolution 2005/69’ (2005) UN Doc E/CN.4/RES/2005/69

UN Office of the High Commissioner for Human Rights, ‘Principled Pragmatism - the Way Forward for Business and Human Rights’ (7 June 2010) <https://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx> accessed 10 May 2021

UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (2012) UN Doc HR/PUB/12/02

UN Office of the High Commissioner for Human Rights 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (2017)

UN Office of the High Commissioner for Human Rights, 'UN Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies' (2020) <https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf> accessed 5 May 2021

Other International Guidelines and Recommendations

European Parliament, 'European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' (2021) 2020/2129(INL)

Expert Group on Global Climate Obligations, 'Oslo Principles on Global Climate Change Obligations' (2015)

Expert Group on Climate Obligations of Enterprises, 'Principles on Climate Obligations of Enterprises' (2018)

ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Fifth Edition)' (Governing Body of the International Labour Office 2017)

OECD, 'OECD Guidelines for Multinational Enterprises' Edition 2011.

Journal Articles

Barritt E and Sediti B, 'The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South' (2019) 30 King's Law Journal 203

Baxi U, 'Towards a Climate Change Justice Theory?' (2016) 7 Journal of Human Rights and the Environment 7

Birchall D, 'Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights' (2019) SSRN Electronic Journal

Birchall D, 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts' (2019) 25 Australian Journal of Human Rights 428

Birchall D, 'Corporate Power over Human Rights: An Analytical Framework' (2021) 6 Business and Human Rights Journal 42

Bonnitcha J and McCorquodale R, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899

Bonnitcha J and McCorquodale R, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III' (2017) 28 European Journal of International Law 929

Boyle A, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613

Boyle A, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 International and Comparative Law Quarterly 759

Brabant S and Savourey E, 'A Closer Look at the Penalties Faced by Companies' (2017) International Review of Compliance and Business Ethics <https://media.business-humanrights.org/media/documents/cc551474b8206d6a7b9c6a92c2a3fb280c881139.pdf> accessed 10 May 2021

Burkett M, 'Climate Reparations' (2009) 10 Melbourne Journal of International Law 509

Davis R, 'The UN Guiding Principles on Business and Human Rights and Conflict-affected Areas: State Obligations and Business Responsibilities' (2012) 95 International Review of the Red Cross 961

de Graaf KJ and Jans JH, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law 517

Deva S, 'Corporate Human Rights Abuses: What Role for the National Human Rights Institutions?' in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region* (Routledge 2011)

Deva S, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013)

Doelle M and Seck S, 'Loss & Damage from Climate Change: From Concept to Remedy?' (2020) 20 Climate Policy 669

Dupuy P-M, 'Soft Law and the International Law of the Environment' (1990) 12 Michigan Journal of International Law 420

Faure MG and Nollkaemper A, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 43 Stanford Journal of International Law 123

Ganguly G, Setzer J and Heyvaert V, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841

Grasso M and Vladimirova K, 'A Moral Analysis of Carbon Majors' Role in Climate Change' (2020) 29 Environmental Values 175

Khoury S and Whyte D, 'Sidelining Corporate Human Rights Violations: The Failure of the OECD's Regulatory Consensus' (2019) 18 Journal of Human Rights 363

Lazarus RJ, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 Cornell Law Review 1153

Lin J, ‘The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)’ (2015) 5 Climate Law 65

Macchi C, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of “Climate Due Diligence”’ (2020) Business and Human Rights Journal 1

Mégret F, ‘Nature of Obligations’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018)

Moore M, ‘Global Justice, Climate Change and Miller’s Theory of Responsibility’ (2008) 11 Critical Review of International Social and Political Philosophy 501

Motupalli C, ‘Intergenerational Justice, Environmental Law, and Restorative Justice’ (2018) 8 Washington Journal of Environmental Law & Policy 333

Omuko LA, ‘Applying the Precautionary Principle to Address the “Proof Problem” in Climate Change Litigation’ (2016) 21 Tilburg Law Review 52

Osofsky HM, ‘The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights’ (2006) 31 American Indian Law Review 675

Peel J and Osofsky HM, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015)

Peel J and Osofsky HM, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 Transnational Environmental Law 37

Roht-Arriaza N, ‘Human Rights in the Climate Change Regime’ (2010) 1 Human Rights and the Environment 211

Ruggie JG and Sherman JF, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 European Journal of International Law 921

Savaresi A and Auz J, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 Climate Law 244

Scheltema, Martijn, ‘Assessing the Effectiveness of Remedy Outcomes of Non-Judicial Grievance Mechanisms’ (2014) Dovenschmidt Quarterly 190

Seck SL, ‘Business Responsibilities for Human Rights and Climate Change - A Contribution to the Work of the Study Group on Business and Human Rights of the International Law Association’ (2017) SSRN Electronic Journal

Seck SL, ‘Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty’ (2017) 26 Transnational Law and Contemporary Problems 383

Schleussner C-F and others, ‘Science and Policy Characteristics of the Paris Agreement Temperature Goal’ (2016) 6 Nature Climate Change 827

Thompson B, ‘Determining Criteria to Evaluate Outcomes of Businesses’ Provision of Remedy: Applying a Human Rights-Based Approach’ (2017) 2 Business and Human Rights Journal 55

Toft KH, ‘Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology’ (2020) 5 Business and Human Rights Journal 1

Van Ho T, ‘Defining the Relationships: “Cause, Contribute, and Directly Linked to” in the UN Guiding Principles on Business and Human Rights’ (2021) 43 Human Rights Quarterly <http://repository.essex.ac.uk/28638/> accessed 25 April 2021

Wewerinke-Singh M, ‘Remedies for Human Rights Violations Caused by Climate Change’ (2019) 9 Climate Law 224

Books and Book Chapters

Atapattu SA, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016)

Boyd DR, ‘Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment’ in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Cambridge University Press 2018)

Brunnée J and others, ‘Introduction’ in Lord QC, Richard and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012)

Brunnée J and others, ‘Overview of Legal Issues Relevant to Climate Change’ in Richard Lord QC and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012)

Cantú Rivera H, ‘National Human Rights Institutions and Their (Extended) Role in the Business and Human Rights Field’ in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Limited 2020)

Riddell A, ‘Human Rights Responsibilities of Private Corporations for Climate Change? The State as a Catalyst for Compliance’ in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights* (Routledge 2016)

Ruggie J, ‘The Social Construction of the UN Guiding Principles on Business and Human Rights’ in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Limited 2020)

Redgwell C, ‘Access to Environmental Justice’ in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007)

Savaresi A and Hartmann J, ‘Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry’ in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (1st edn, Cambridge University Press 2020)

Van Huijstee M and Wilde-Ramsing J, ‘Remedy Is the Reason: Non-Judicial Grievance Mechanisms and Access to Remedy’ in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Limited 2020)

Wallimann-Helmer I and others, ‘The Ethical Challenges in the Context of Climate Loss and Damage’ in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change* (Springer International Publishing 2019)

Reports

Center for International Environmental Law and CARE International, ‘Climate Change: Tackling the Greatest Human Rights Challenge of Our Time’ (2015)

Expert Group on Global Climate Obligations, ‘Commentary to the Oslo Principles on Global Climate Change Obligations’ (2015) <https://globaljustice.yale.edu/sites/default/files/files/Oslo%20Principles%20Commentary.pdf> accessed 12 May 2021

Franken S, ‘Observations from Climate Change Litigation’ in Lise Smit and Ivano Alogna (eds), *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report* (2021) <https://www.biicl.org/categories/business-and-human-rights> accessed 5 March 2021

Heede R, ‘Carbon Majors: Accounting for Carbon and Methane Emissions 1854-2010: Methods & Results Report’ (Climate Mitigation Services 2014)

Intergovernmental Panel on Climate Change, ‘Climate Change 2014: Synthesis Report’ (Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 2014)

Miller-Dawkins M, Macdonald K and Marshall S, ‘Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms’ (2016)

OECD, ‘National Contact Points for Responsible Business Conduct. Providing Access to Remedy: 20 Years and the Road Ahead’ (OECD 2020)

OECD Watch, ‘The State of Remedy under the OECD Guidelines’ (2020) OECD Watch Briefing Paper

OHCHR, ‘Access to Remedy for Business-Related Human Rights Abuses’ (Office of the UN High Commissioner for Human Rights, Accountability and Remedy Project II 2017)

Ruggie J and Nelson T, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges’ (Corporate Social Responsibility Initiative 2015) Working Paper No. 66

Savaresi A, ‘Human Rights-Based Climate Change Litigation’ in Lise Smit and Ivano Alogna (eds), *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report* (2021) <https://www.biicl.org/categories/business-and-human-rights> accessed 5 March 2021

Setzer J and Byrnes R, ‘Global Trends in Climate Change Litigation: 2020 Snapshot’ (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2020) Policy report

Union of Concerned Scientists, ‘The 2018 Climate Accountability Scorecard: Insufficient Progress from Major Fossil Fuel Companies’ (2018)

United Nations Environment Programme, ‘The Emissions Gap Report 2020’ (2020)

United Nations Environment Programme and Sabin Center for Climate Change Law, 'Status of Climate Change Litigation, a Global Review' (2017)

European Union Agency for Fundamental Rights, 'Business and Human Rights - Access to Remedy' (Publication Office of the European Union 2020)

News Articles

Bals C, 'RWE Lawsuit: First Test Case in Europe to Clarify Responsibilities of Carbon Majors for Climate Change' (*Germanwatch*, 8 November 2018) <https://germanwatch.org/en/15999> accessed 23 March 2021

Baudouin C, 'A Historic Decision in the Case of the Century: The French State Is Found Liable for Its Insufficient Climate Action' (*Notre Affaire à Tous*, 3 February 2021) <https://notreaffaireatous.org/pr-a-historic-decision-in-the-case-of-the-century-the-french-state-is-found-liable-for-its-insufficient-climate-action/#:~:text=In%20its%20Case%20of%20the,in%20reducing%20greenhouse%20gas%20emissions.> accessed 10 May 2021

Boren Z, Kaufman AC and Carter L, 'Revealed: BP And Shell Back Anti-Climate Lobby Groups Despite Pledges' (*HuffPost*, 28 September 2020) <https://www.huffingtonpost.co.uk/entry/bp-shell-climate_n_5f6e3120c5b64deddeed6762> accessed 12 May 2021

Chatelain L, 'First Court Decision in the Climate Litigation against Total: A Promising Interpretation of the French Duty of Vigilance Law' (*Business & Human Rights Resource Centre*, 25 March 2021) <https://www.business-humanrights.org/en/blog/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law/> accessed 25 April 2021

Confino J, 'Cleaning up the Global Compact: Dealing with Corporate Free Riders' (*The Guardian*, 26 March 2012) <https://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash> accessed 10 May 2021

European Coalition for Corporate Justice, 'French Corporate Duty of Vigilance Law' <https://vigilance-plan.org/wp-content/uploads/2019/06/2018-FAQ-in-English.pdf> accessed 10 May 2021

Gaynor T, 'Climate Change Is the Defining Crisis of Our Time and It Particularly Impacts the Displaced' (*UNHCR*, 30 November 2020) <https://tinyurl.com/35yhuvfr> accessed 25 April 2021

'Germany Pledges to Adjust Climate Law after Court Verdict' (*AP news*, 30 April 2021) <https://apnews.com/article/germany-europe-climate-climate-change-environment-and-nature-191b8ffca5ba6994ebd402b04432e6c8> accessed 10 May 2021

Harvey F, 'Carbon Emissions to Soar in 2021 by Second Highest Rate in History' (*The Guardian*, 20 April 2021) <https://www.theguardian.com/environment/2021/apr/20/carbon-emissions-to-soar-in-2021-by-second-highest-rate-in-history> accessed 25 April 2021

Hasemyer D and Cushman Jr. JH, 'Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty' (*Inside Climate News*)

<https://insideclimatenews.org/news/22102015/Exxon-Sowed-Doubt-about-Climate-Science-for-Decades-by-Stressing-Uncertainty/> accessed 12 April 2021

Howard E, 'The Rise and Rise of the Fossil Fuel Divestment Movement' (*The Guardian*, 19 May 2015) <https://www.theguardian.com/environment/2015/may/19/the-rise-and-rise-of-the-fossil-fuel-divestment-movement> accessed 12 May 2021

Laville S, 'Air Pollution a Cause in Girl's Death, Coroner Rules in Landmark Case' (*The Guardian*, 16 December 2020) <https://www.theguardian.com/environment/2020/dec/16/girls-death-contributed-to-by-air-pollution-coroner-rules-in-landmark-case> accessed 15 March 2021

Leahy S, 'Most Countries Aren't Hitting 2030 Climate Goals, and Everyone Will Pay the Price' (*National Geographic*, 5 November 2019) <https://www.nationalgeographic.com/science/article/nations-miss-paris-targets-climate-driven-weather-events-cost-billions> accessed 30 April 2021

Milman O, 'Biden Vows to Slash US Emissions by Half to Meet "Existential Crisis of Our Time"' (*The Guardian*, 22 April 2021) <https://www.theguardian.com/us-news/2021/apr/22/us-emissions-climate-crisis-2030-biden> accessed 30 April 2021

Noel C, Blouin L and Laurence M, 'Canada's New Climate Change Target Will Exceed 40% Cut in Emissions: Radio-Canada Sources' (*CBC News*, 21 April 2021) <https://www.cbc.ca/news/politics/ghg-emissions-target-reductions-1.5996400> accessed 10 May 2021

Rushbrook E and Bain H, 'Climate Change Litigation – Expect the Unexpected' (*Russell McVeagh*, 10 March 2020) <https://www.russellmcveagh.com/insights/march-2020/climate-change-litigation-expect-the-unexpected> accessed 10 May 2021

Sarlième M, 'Climate Change: How to Make Corporations Responsible?' (*JusticeInfo.net*, 5 December 2019) <https://www.justiceinfo.net/en/43130-climate-change-how-to-make-corporations-responsible.html> accessed 4 May 2021

Stolyarov G and Astakhova O, 'Putin Calls for Russian Greenhouse Gas Emissions to Be Lower than EU's' (*Reuters*, 21 April 2021) <https://www.reuters.com/business/environment/putin-says-russias-greenhouse-gas-emissions-should-be-lower-than-eus-2021-04-21/#:~:text=Russia%20joined%20the%202015%20Paris,to%20carbon%20neutrality%20by%202050.> accessed 10 May 2021

'UN Sustainable Development Goals' (*Shell*) <https://www.shell.com/sustainability/our-approach/un-sustainable-development-goals.html#iframe=L3dlYmFwcHMvc2hlbGwtc2RnLw> accessed 12 May 2021

Vetter D, 'This French Lawsuit Is Making Oil Companies Nervous' (*Forbes*, 30 January 2020) <https://www.forbes.com/sites/davidrvetter/2020/01/30/this-french-lawsuit-is-making-oil-companies-nervous/?sh=7d464d5b2fc6> accessed 20 May 2021

World Health Organisation, '7 Million Premature Deaths Annually Linked to Air Pollution' (25 March 2014) <https://www.who.int/mediacentre/news/releases/2014/air-pollution/en/> accessed 10 May 2021

You X, ‘China’s 2060 Climate Pledge Is “Largely Consistent” with 1.5C Goal, Study Finds’ (*Carbon Brief*, 22 April 2021) <https://www.carbonbrief.org/chinas-2060-climate-pledge-is-largely-consistent-with-1-5c-goal-study-finds#:~:text=China%20is%20the%20world's%20largest,30%25%20of%20the%20global%20total.&text=The%20cross%2Dmodel%20evaluation%20shows,%E2%80%9Cno%2Dpolicy%E2%80%9D%20scenario.> accessed 10 May 2021

Webinars

Climate Change in the Courts
<https://www.youtube.com/watch?v=aRs5snxhVWU&ab_channel=IUCNWCEL>

Launch Event: Report on 20 Years of NCPs as Grievance Mechanisms (2020) <https://www.youtube.com/watch?v=q1PwYAY8FoY&feature=emb_title> accessed 6 January 2021

UN Forum on Business and Human Rights, *Addressing Climate Change* (2019) <http://webtv.un.org/watch/addressing-climate-change-forum-on-business-and-human-rights-2019/6109626824001/?term=&lan=spanish> accessed 10 May 2021

Other Secondary Sources

American Cancer Society, ‘What Causes Lung Cancer?’ <https://www.cancer.org/cancer/lung-cancer/causes-risks-prevention/what-causes.html> accessed 6 May 2021

‘Article 6:162 Dutch Civil Code’ (*Stanford World Intermediary Liability Map*) <https://wilmap.stanford.edu/entries/article-6162-dutch-civil-code> accessed 20 April 2021

Bachelet M, ‘“Stepping up Government Leadership: From Commitments to Action”: Opening Statement by Michelle Bachelet, UN High Commissioner for Human Rights’ (2019)

de Bruijn KC, ‘A Paradigm Shift from Voluntary to Court-Ordered Climate Change Mitigation? The Potentials and Challenges of a Human Rights-Based Approach’ (Master’s Thesis, Lund University 2020)

‘In Re Greenpeace Southeast Asia and Others’ (*Climate Change Litigation Databases*) <http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 12 May 2021

Luyucks J and Hendrikx A, ‘Climate Change Actions against Corporations: Milieudefensie et al. v. Royal Dutch Shell Plc.’ (*Clifford Chance: Business and Human Rights Insights*, 13 January 2021) <https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/climate-change-actions-against-corporations-milieudefensie-et-al-v-royal-dutch-shell-plc.html> accessed 16 May 2021

OECD Watch, ‘Complaints Database’ <https://www.oecdwatch.org/complaints-database/> accessed 20 May 2021

Ornes S, ‘Explainer: What Is Attribution Science?’ (*Science News for Students*, 30 July 2019) <https://www.sciencenewsforstudents.org/article/explainer-what-attribution-science#:~:text=attribution%20science%20A%20field%20of,heat%20or%20odd%20storm%20trajectories.> accessed 10 May 2021

Pedersen OW, ‘The European Convention of Human Rights and Climate Change - Finally!’ (*EJIL:Talk!*, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 20 April 2021

Ruggie J, ‘Embedding Global Markets: Lessons from Business & Human Rights’ (CEL Annual Lecture, University College London 2015) <https://tinyurl.com/ybjty3mb> accessed 10 May 2021

Ruggie JG, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013)

Sabin Center for Climate Change Law, ‘Climate Change Litigation Databases’ <http://climatecasechart.com/climate-change-litigation/> accessed 10 May 2021

‘The Intergovernmental Panel on Climate Change’ <https://www.ipcc.ch/> accessed 10 May 2021

United Nations, ‘Global Compact’ (2000) <https://www.unglobalcompact.org/> accessed 10 May 2021

‘Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM)’ (*United Nations Climate Change*) <https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage-ld/warsaw-international-mechanism-for-loss-and-damage-associated-with-climate-change-impacts-wim> accessed 23 March 2021

Table of Cases

Regional Courts

African Court on Human and Peoples' Rights

Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights (CESR) v Nigeria [2002] ACHPR 155/96

European Court of Human Rights

Budayeva and others v Russia [2008] ECtHR App Nos 153339/02, 21166/02, 11673/02, 15343/02

Cláudia Duarte Agostinho et al v Portugal and 32 other States European Court of Human Rights 39371/20

Guerra and others v Italy [1998] ECtHR App No 14967/89

López Ostra v Spain [1994] ECtHR App No 16798/90

Öneryildiz v Turkey [2004] ECtHR (GC) App No 48939/99

Inter-American Court of Human Rights

Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina [20202] Inter-American Court of Human Rights

IACtHR, 'Advisory Opinion: The Environment and Human Rights' (2017) OC-23/17

Inter-American Commission on Human Rights

Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused By Acts and Omissions of the United States [2006] Inter-American Commission on Human Rights P-14133-05

Domestic Courts

Argentina

Carballo et al v MSU SA, UGEN SA, & General Electric [2017] Federal Court of Azul

FOMEO v MSU SA, Rio Energy SA, & General Electric [2017] Federal Court of San Nicolas

Hahn et al v APR Energy SRL [2017] Federal Court of Campane

OAAA v Araucaria Energy SA [2017] Federal Court of Mercedes

France

Notre Affaire à Tous et al v Total (application) [2020] Nanterre Civil Court

Germany

Luciano Lliuya v RWE AG [2015] Essen Regional Court

Neubauer et al v Germany [2021] Federal Constitutional Court of Germany 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20

New Zealand
Smith v Fonterra Co-Operative Group Limited [2020] High Court of New Zealand CIV-2019-404-001730, 419 NZHC

Nigeria
Gbemre v Shell Petroleum Development Company of Nigeria Ltd et al [2005] Federal Court of Nigeria FHC/B/CS/53/05

Switzerland
Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and others [2018] Federal Administrative Court of Switzerland A-2992/2017

The Netherlands
Milieudefensie et al v Royal Dutch Shell plc (application) [2019] District Court of the Hague 90046903

Urgenda Foundation v The Netherlands [2019] Supreme Court of the Netherlands ECLI:NL:HR:2019:2006

United Kingdom
Fairchild v Glenhaven Funeral Services Ltd et al [2002] 22 UKHL (House of Lords)

United States of America
Bullock v Philip Morris USA Inc [2011] California Court of Appeal, Second District B222596

Juliana v United States [2020] United States Court of Appeals for the Ninth Circuit No. 18-36082

Native Village of Kivalina v ExxonMobil Corp [2009] US District Court for the Northern District of California 4:08-cv-01138-SBA

People of the State of California v General Motors Corporation et al [2007] US District Court for the Northern District of California C06-05755 MJJ

People of the State of New York v Exxon Mobil Corp [2019] New York Supreme Court 452044/2018

Complaints at the non-judicial mechanisms

Bruno Manser Fund (BMF) v Sakto Corporation et al (Sakto) [2017] NCP Canada

CEDHA, INCASUR Foundation, SOMO and Oxfam Novib v Nidera Holding BV [2012] NCP Netherlands

Clean Clothes Campaign Denmark and Active Consumers v PWT Group [2016] NCP Denmark

Climate Network and Concerned Scientists Norway v Statoil [2012] NCP Norway

Friends of the Earth Australia et al v Australia and New Zealand Banking Group [2020] NCP Australia

Germanwatch v Volkswagen [2007] NCP Germany

Indigenous women and Divest Invest Protect v Credit Suisse [2020] NCP United States of America

Indigenous Federations from Peru et al vs Pluspetrol Resources Corporation BV [2021] NCP Netherlands

Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) v ING [2019] NCP Netherlands

Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change [2015]

The Future in Our Hands (FIOH) v Intex Resources ASA [2011] NCP Norway

WWF International and Soco International Plc [2017] NCP UK