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Corporate Responsibility and Human Rights: A way forward for climate litigation?

Master's Thesis

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Written during the hottest summer[1] on record.[2]

[1] Summer in the Northern Hemisphere; June to August 2023.
[2] Climate Copernicus, 'Summer 2023: Hottest on Record' (Climate Copernicus, 5 September 2023) <https://climate.copernicus.eu/summer-2023-hottest-record> accessed 25 September 2023.

Table of Contents

Introduction

It is without doubt, that humanity faces unprecedented changes in the Earth's environment with drastic consequences thereof already being felt worldwide. Human activity has been the main agent in these changes for at least several last decades. The process called the "Great Acceleration" (escalation of human activity after the WWII) has caused the irreversible changes in the geology of Earth, which led scientists to propose new geological epoch: the Anthropocene[3] (the term popularised at the beginning of the Millenium by meteorologist and chemist Paul Crutzen).[4] Climate crisis caused mainly by the rapid increase of greenhouse gas (GHG) emissions (mainly CO_2)[5] is perhaps the most evident and discussed result of the Great Acceleration. Although the human influence on the Earth system is beyond dispute, the question remains, which agents in the human world are causing the crisis. This is ultimately the question of environmental justice.

Despite unequivocal assessment of the scientists and growing pressure from civil society, response of the international community is still insufficient. Urgency to deal with human-caused climate change was again stated (with even more confidence) by the recent IPCC Report of 2023.[6] According to the report, global surface temperature has already risen by 1.1°C above 1850-1900 in 2011-2020.[7] In order to limit temperature increase above pre-industrial levels to 2°C or 1.5°C (Art. 2 (1) (a) Paris Agreement), the *"near-term integrated climate action"*[8] is necessary, as *"the window of opportunity to secure a liveable and sustainable future for all"* is *"rapidly closing."*[9]

[3] Will Steffen and others, 'The trajectory of the Anthropocene: The Great Acceleration' (2015) 2(1) The Anthropocene Review 81 <http://dx.doi.org/10.1177/2053019614564785> accessed 25 September 2023.
[4] Paul J Crutzen, 'Geology of mankind' (2002) 415(6867) Nature 23 <http://dx.doi.org/10.1038/415023a> accessed 25 September 2023.
[5] Kieran Ohara, 'Physical drivers of climate change', *Climate Change in the Anthropocene* (Elsevier 2022) 25-26 <http://dx.doi.org/10.1016/b978-0-12-820308-8.00011-8> accessed 26 September 2023.
[6] Intergovernmental Panel on Climate Change (IPCC). 'Climate Change 2023: Synthesis Report - Summary for Policymakers.' 1-34, p 7 In H. Lee & J. Romero (Eds.), *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> accessed 25 September 2023.
[7] Ibid p 2.
[8] Ibid p 24.
[9] Ibid p 24.

Climate crisis is a model example of a global issue and the urge to mitigate it (to prevent it by mainly reducing GHG emissions) requires global governance effort.[10] As subjects of international law and signatories of the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement, states are viewed as natural bearers of obligations to reduce GHG emissions and adapt for irreversible consequences of changing climate, and for at least last decade, also targets of climate litigation efforts.[11]

Leaving aside the state-based lenses of the international climate governance framework, the climate crisis is a complex issue with many non-state stakeholders involved; traditional approach to compare global emissions on a state level might be misleading as some argue, that fossil corporations (so called "carbon majors") are the main polluters to blame. Famously, activist Richard Heede of the Climate Accountability Institute (CAI) has "accused" 90 companies for most climate change.[12] With their complicated structure and worldwide operation, emissions of fossil corporations exceed those of most states.

Advancement of globalisation has brought attention to the corporate human rights violations[13] caused by transnational corporations (TNCs), which are more and more considered in the climate change context. Business, human rights and climate change are increasingly viewed as interconnected and interdependent issues.[14]

It is not a surprise, then, that the overreaching activities of the TNCs (among them fossil corporations) was the focus of many climate justice NGOs, attempting to hold corporations accountable for their contributions in the various jurisdictions.[15] Two cases brought most international attention. "Carbon Majors Inquiry" (*In Re Greenpeace Southeast Asia*) of the

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[10] David Coen, Tom Pegram and Julia Kreienkamp, Global Climate Governance (Cambridge University Press 2020) Accessed online 17 April 2022.

[11] Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2021 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, July 2021) <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/> accessed 20 September 2023.

[12] Douglas Starr, 'Just 90 companies are to blame for most climate change, this "carbon accountant" says.' (Science.org, 25 August 2016) <https://www.science.org/content/article/just-90-companies-are-blame-most-climate-change-carbon-accountant-says> accessed 20 September 2023.

[13] Amnesty International, 'Corporate accountability' (Www.Amnesty.Org.) <https://www.amnesty.org/en/what-we-do/corporate-accountability/> accessed 20 September 2023.

[14] Sara K Phillips and Nicole Anschell, 'Building Business, Human Rights and Climate Change Synergies in Southeast Asia: What the Philippines' National Inquiry on Climate Change Could Mean for ASEAN' (2022) 13(1) Journal of Human Rights and the Environment 238, p 260, <http://dx.doi.org/10.4337/jhre.2022.01.10> accessed 20 September 2023.

[15] Annalisa Savaresi and and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontier' (2022) 13(1) Journal of Human Rights and the Environment 7, p 14 <http://dx.doi.org/10.4337/jhre.2022.01.01> accessed 20 September 2023.

Philippines' Commission on Human Rights, which assessed the overall responsibility of around 50 carbon majors and impact of their activities on human rights of the Philippine population. "Shell case" (*Milieudefensie et al. v Royal Dutch Shell, plc*) of the Hague District Court of the Netherlands then followed the pioneering *Urgenda* case, establishing the emissions reduction obligation of then Dutch-based carbon major Royal Dutch Shell (RDS).

However, this new body[16] of climate change litigation against corporations faces many challenges, such as extent of corporate accountability along the supply chain, jurisdiction over their transboundary activities and overall justiciability of civil claims in the climate change context.

The main question of this work is **how the human rights obligations of corporations** (which are enshrined e.g. in international soft law, which played an important role in both cases mentioned above) **could help enhance the accountability of corporations** and thus improve the overall efficiency of polycentric climate governance.[17] Human rights approach towards the corporate pollution might be the key factor in holding the most powerful actors in the age of Great Acceleration accountable.

Structure of the work

Apart from Introduction and Conclusion, this work is divided into five Parts, which are further divided into Chapters and Subchapters.

In the **first part**, I will focus on the role of the private sector with respect to the climate crisis in general. Firstly, I am going to examine the impact of activities of corporations (mainly of the largest fossil corporations, so called "carbon majors") on the Earth system. Secondly, I will try to show the current status of the private sector in the sphere of climate governance.

In the **second part**, I will expose the human rights dimension of climate change with respect to corporate activity. This part will be divided into two Chapters. In the first chapter, I want to describe which human rights are being violated by the polluting activity of the private entities – not only with respect to rising GHG emissions, but also caused by other exploitation of the natural world which affects the environment (and climate system) and local communities.

[16] See e.g., Setzer and Higham 2021 (n 11) p 28; Savaresi and Setzer (n 15) p 14.
[17] Marcel J Dorsch and Christian Flachsland, 'A Polycentric Approach to Global Climate Governance' (2017) 17(2) Global Environmental Politics 45 <http://dx.doi.org/10.1162/glep_a_00400> accessed 25 September 2023.

In the **third part**, I will provide an outline of various sources (on international, supra-national and national level) of corporate human rights obligations, introducing concepts such as Corporate Social Responsibility (CSR) and Business and Human Rights (BHR), their history and recent evolution.

In the **fourth part**, my main goal is to analyse case law, where issues described in two previous parts intersect: That is – climate litigations against corporate actors. After a brief definition of climate litigation and introduction of typology of climate cases, I will review cases from different (mostly European) jurisdictions targeting the reduction of GHG emissions of private entities. In comparative analysis, I will aim at **finding sources of emission reduction obligation for corporations. Can we observe a pattern in the recent case law and what is the role of human rights? In state-targeted climate litigation, "a human rights turn"[18] is already researched and established, can we trace a similar trend in a sphere of climate lawsuits against corporations?**

Finally, in the **fifth part**, I will discuss potential and limits of climate litigation against the private sector from a more general perspective, trying to describe main obstacles of these litigations (also from a perspective of "climate justice"), focusing on limits of our legal systems. Before concluding remarks, I will return to the question of corporate responsibility for human rights and what could be expected from this field for improving the complex climate governance system. What practical steps can be done to make private entities more accountable? Or is it even possible without a system change?

Preliminary remarks on theoretical background and methodology

Research on climate litigation requires a multi-disciplinary approach. For clarification of the work and setting the main starting positions of my thesis, I will define a couple of terms from natural science and political theory, which are crucial for understanding the context of climate litigation.

First of all, I start from the premise that the climate crisis (or climate change) cannot be separated from the general crisis of the environment. As I mentioned at the beginning of the Introduction, this crisis can be connected to the rise of various socio-economic factors ('Great

[18] See Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2017) 7(1) Transnational Environmental Law 37 <http://dx.doi.org/10.1017/s2047102517000292> accessed 25 September 2023.

Acceleration') and led to a change on a large scale, which started debates among scholars about establishing a new geological epoch, the Anthropocene. Interconnectedness and complexity of human influence in the age of Anhropocene has given an impulse to the scientific community to establish a new interdisciplinary field, the **Earth System Science**.[19] The Earth System Science discourse has developed not only concept of Anthropocene and Great Acceleration, but also two other important concepts: Planetary Boundaries,[20] and Climate Tipping Points.[21] Earth system science provides an important context for social sciences and even law.

To analyse law in the context of "Earth system crisis," traditional sectoral approach of environmental law might seem insufficient. For example, Geoffrey Garver proposes transition from environmental law to "**ecological law,"** which should take into account ecological limits such as planetary boundaries.[22] Kotzé and Kim have highlighted main problems of environmental law: 1) inability to achieve deep structural reforms, 2) state-centrism, 3) anthropocentrism, 4) assumptions of Holocene stability and 5) reductionism.[23] Based on this analysis and "earth system governance" discourse, they propose establishing the field of **"earth system law."**[24] Overall, in my view, a **critical approach** to our legal systems is necessary when dealing with problems arising from the global environmental crisis. Environmental issues are not a traditional domain of "critical legal studies"[25] discourse, yet there are attempts to create "critical environmental law."[26] To sum up, notwithstanding whether we follow "ecological law," "earth system law" or "critical environmental law" narrative, I would like to use the normative research method[27] in the fifth part of the thesis, having in mind the limits of current environmental law.

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[19] See Will Steffen and others, 'The emergence and evolution of Earth System Science' (2020) 1(1) Nature Reviews Earth & Environment 54 <http://dx.doi.org/10.1038/s43017-019-0005-6> accessed 25 September 2023.
[20] Will Steffen and others, 'The emergence and evolution of Earth System Science' (2020) 1(1) Nature Reviews Earth & Environment 54 <http://dx.doi.org/10.1038/s43017-019-0005-6> accessed 25 September 2023.
[21] Timothy M Lenton and others, 'Climate tipping points — too risky to bet against' (2019) 575(7784) Nature 592 <http://dx.doi.org/10.1038/d41586-019-03595-0> accessed 25 September 2023.
[22] See Michelle Maloney and others, *From Environmental to Ecological Law* (Taylor & Francis Group 2020); Geoffrey Garver, *Ecological Law and the Planetary Crisis* (Taylor & Francis Group 2020).
[23] Louis J Kotzé and Rakhyun E Kim, 'Earth system law: The juridical dimensions of earth system governance' (2019) 1 Earth System Governance 100003 <http://dx.doi.org/10.1016/j.esg.2019.100003> accessed 25 September 2023.
[24] Ibid.
[25] As an american movement, Czech literature on the topic is limited. See e.g. [in Czech]: Tomáš Sobek and Martin Hapla, *Filosofie práva* (Nugis Finem Publishing, 2020) pp 151-170.
[26] Andreas Philippopoulos-Mihalopoulos, 'Towards a Critical Environmental Law', *Law and Ecology* (Routledge 2011) pp 18-38, <http://dx.doi.org/10.4324/9780203829691-2> accessed 25 September 2023.
[27] For the differences between descriptive, analytical, normative and empirical methods in the Czech context, see [in Czech] Michal Bobek, 'Výzkum v právu: reklama na Nike anebo kvantová fyzika?' (2016) 6 Jurisprudence 3.

This leads me to my last remark considering **environmental (or climate) justice**. Environmental justice manifests itself in different dimensions,[28] such as spatial (division between countries affected), social (division between "social classes," taking into account marginalised groups) and temporal (intra- and intergenerational justice)[29] Global South-Global North divide[30] is one of the important aspects which will be touched on frequently in the following chapters (and ultimately, in final discussion) and cannot be separated from the human rights debate.

Thus, when dealing with dynamic interaction of fossil corporations and the environment, and legal analysis thereof, I will keep in mind the overall context of the Earth System crisis, limits of today's environmental law regime(s) and implications of environmental justice.

Sources and language

As I write this work in English and as is the scope of the topic international, the majority of the thesis is based on English-language sources (except the discussion of Czech context). In spite of that, I want to refer the Czech reader to relevant sources in Czech as well. Because of its cultural and legal similarities to the Czech context, as well as thanks to the more progressive jurisprudence in terms of climate law, I was also working with German sources.

Sources in languages other than English (as well as translation into English) will be noted in brackets in footnotes.

Footnotes and bibliography are cited according to the OSCOLA (Oxford University Standard for Citation of Legal Authorities) referencing style.[31]

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[28] See [in German] Michael Kloepfer, *Umweltgerechtigkeit: Environmental Justice in der Deutschen Rechtsordnung* (Duncker & Humblot GmbH 2006) pp 20-21.
[29] See ibid pp 24-28.
[30] I prefer terms (Global) South and (Global) North to terms like "third-world" or "developing" (as opposed to "first-world" or "developed") country/society.
[31] Style typical for the British legal writing. As it differs from the common Czech referencing styles to some degree, I advise the reader to follow the guides if further clarification needed, see e.g. Oxford Law Faculty, 'OSCOLA: Oxford Standard for Citation of Legal Authorities' (Oxford University Faculty of Law) <https://www.law.ox.ac.uk/oscola> accessed 25 September 2023; Swansea University Library, 'OSCOLA Referencing' (Swansea University Library) <https://libguides.swansea.ac.uk/oscola/home> accessed 25 September 2023.

1. Fossil corporations, climate crisis and polycentric climate governance

1.1 "Carbon Majors:" Who is responsible for the current crisis?

"There are just a few dozen producers [...]*, that are largely responsible for and profiting the most from climate change, while taking very little, if any, action on climate change."*[32]

Debating responsibility[33] for anthropogenic climate change is crucial. The UNFCCC regime adopted in 1992 has established the principle of "common but differentiated responsibility" (CBDR) of the states, which was affirmed by the 1997 Kyoto Protocol and 2015 Paris Agreement (Art. 2(2) Paris Agreement). The UNFCCC framework thus distinguishes between "developed" (industrialised countries of the Global North) and "developing" countries which have contributed very unequally to the total amount of the GHG in the atmosphere. The Kyoto Protocol has therefore focused on emissions cuts by the countries which have benefited most from industrialization and have historically produced the vast majority of global emissions.

However, the concept of "climate responsibility" set by the UNFCCC is not the only possible approach. There have been proposals of taking into account historic emissions (rather than annual ones), national per capita emissions or responsibility of the wealthiest individuals,[34] which could possibly be more "climate just." When we abandon the narrow perspective of nation-based responsibility and concentrate on different actors, there is growing focus on the responsibility of the private sector, namely the largest corporations operating in the fossil fuel (but also, e.g., cement) industry. For their large influence, the term "carbon majors"[35] has appeared in the public space.

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[32] *Carbon Majors Inquiry* (Petition to CHRP of 22 September 2015, Case no. CHR-NI-2016-0001, "Petition") available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.

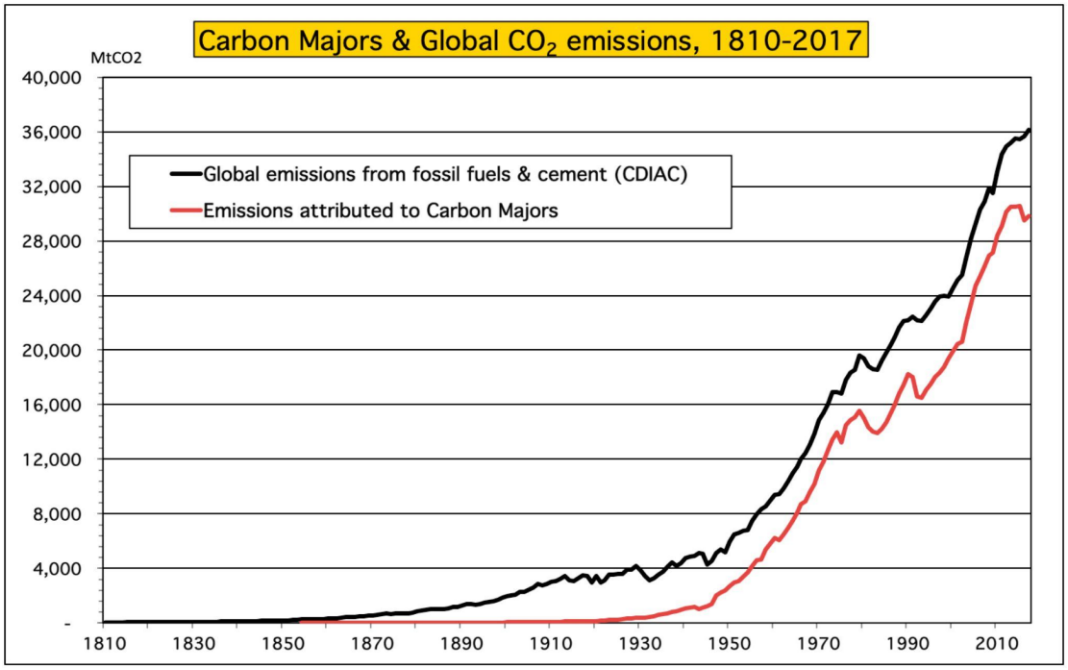
[33] In this part, responsibility is not debated in a strictly legal sense. See discussion responsibility vs accountability/obligation in *Part 3*.

[34] See Peter C Frumhoff, Richard Heede and Naomi Oreskes, 'The climate responsibilities of industrial carbon producers' (2015) 132(2) Climatic Change 157, p 158 <http://dx.doi.org/10.1007/s10584-015-1472-5> accessed 25 September 2023.

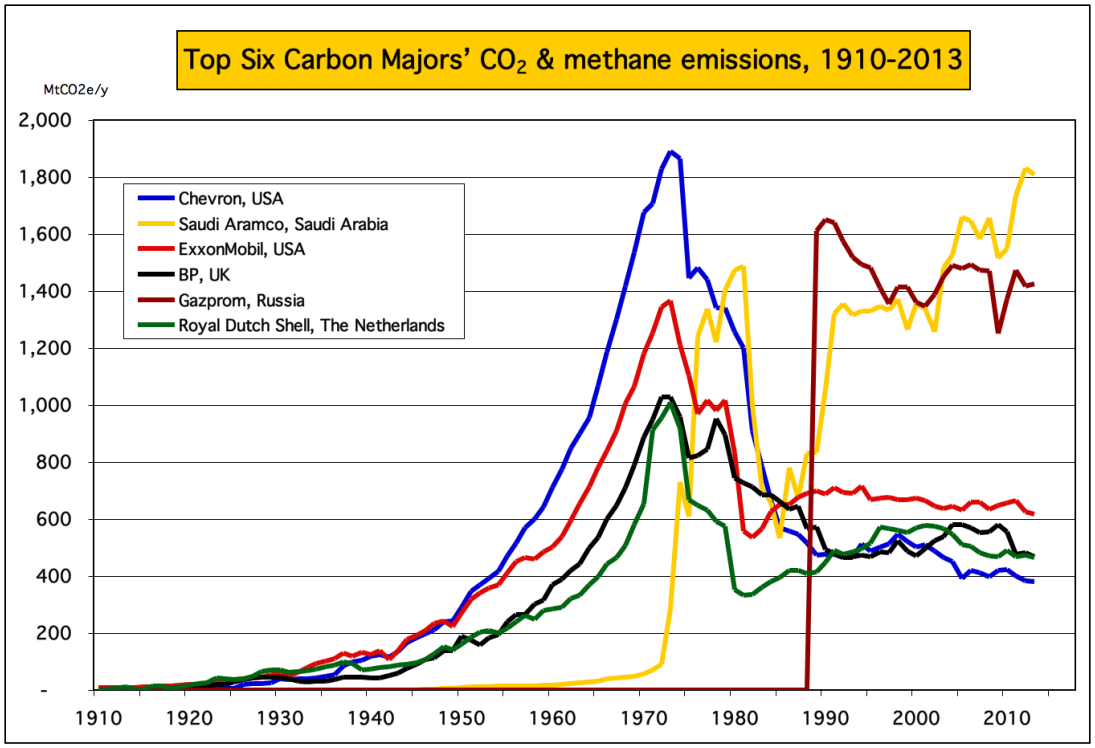
[35] The alternative term "Big Oil" is usually used in a narrower sense for the largest private investor-owned fossil fuel companies and is prevalent in the US context. See Wikipedia, 'Big Oil' https://en.wikipedia.org/wiki/Big_Oil, accessed 25 September 2023. I prefer the broader term Carbon Majors opposed to "fossil fuel corporations", because not all largest emitters of GHG are producing only fossil fuels (oil, gas, and coal).

The paper[36] conducted by Richard Heede has analysed the share of historic emissions (CO_2 and methane) between 1751 and 2010 of 90 largest companies - 50 investor-owned, 31 state-owned, and 9 nation-state producers of oil, natural gas, coal, and cement.[37] According to Heed, 63 % of cumulative worldwide emissions of industrial CO_2 and methane can be attributed to those 90 companies.[38] This is not only a matter of history - one half of total 1751 to 2010 industrial emissions accountable to the largest companies has been emitted only since 1986. Similar conclusion follows from the *Carbon Majors Report* of 2017.[39] According to the report, since 1988 (when anthropogenic climate change was first recognized by establishing the IPCC), only 25 corporate and state producing entities accounted for 51% of global industrial GHG emissions and the largest 100 producers accounted for 71% of global industrial GHG emissions.[40] A 2019 study[41] of the CAI concluded that the top twenty companies have accounted for around 35 % of all fossil fuel and cement emissions worldwide between 1965[42] and 2017. Although the respective studies might vary in methodology and results, the general pattern is clear.

[36] Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122(1-2) Climatic Change 229 <http://dx.doi.org/10.1007/s10584-013-0986-y> accessed 25 September 2023.
[37] Ibid p 231.
[38] Ibid p 234.
[39] Paul Griffin, 'Carbon Majors Report of 2017' (*Carbon Disclosure Project*, www.cdp.net, July 2017) CDP. <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772> Accessed 25 September 2023.
[40] Ibid p 8.
[41] See press release: Climate Accountability Institute (CAI), 'Press Release: Carbon Majors: Update of Top Twenty companies 1965-2017' *(Climate Accountability Institute*, 20 October 2019) <https://climateaccountability.org/pdf/CAI%20PressRelease%20Top20%20Oct19.pdf > accessed 25 Septmeber 2023.
[42] The year 1965 was chosen, because *"recent research has revealed that by mid-1960s the climate impact of fossil fuels was known by industry leaders and politicians."* Ibid.



Picture 1: [43] *Global emissions from fossil fuels and cement compared to emissions attributed to carbon majors. The year 1950 marks the start of so called Great Acceleration.*



Picture 2: [44] *Comparison of emissions produced by the top six carbon majors.*

[43] CAI, <https://climateaccountability.org/images/Carbon_Majors_and_Global_1810_2017_lg.jpg> accessed 25 September 2023.
[44] CAI, <https://climateaccountability.org/wp-content/uploads/2020/12/TopSix-1910-2013.png> accessed 25 September 2023.

Heede argues that the largest industrial pollutants have resources for climate mitigation and adaptation and that some of the companies are resided in countries, which are not listed in Annex 1 (e.g. China, India, Saudi Arabia or Iran.) of the UNFCCC.[45] As they have at their disposal the production capacity and recoverable resources of fossil fuels, the largest companies (not nation states per se), *"hold the key to future fossil fuel production and emissions and (...) future of the planetary climate system."*[46]

According to the conclusion of a 2015 paper, the main reasons for arguing of responsibility of carbon majors is as follows: *"1) They have produced a large share of the products responsible for dangerous anthropogenic interference in the climate system; 2) They continued to produce them well after the danger was scientifically established and recognized by international policymakers; 3) They have worked systematically to prevent the political action that might have stabilized or reduced GHG emissions, including through unethical practices such as promoting disinformation; and 4) While ostensibly acknowledging the threat represented by unabated reliance on fossil fuels, they nevertheless continue to engage in business practices that will lead to their expanded production and use for decades to come."*[47]

Given the above-mentioned statistics and accusations of carbon majors' knowledge and influence on politics, it is no surprise that there is a growing pressure on holding the carbon majors accountable. Although the litigation attempts (see *Part 4*) focus on individual corporations, the landmark 2022 *Carbon Majors Inquiry* in front of the Commission on Human Rights of the Philippines (CHRP) deserves to be mentioned in the introducing chapter (for detailed legal assessment of the finding, see chapter *4.2.1*).

The petitioners have asked, among other questions, *"whether the investor-owned Carbon Majors have breached their responsibilities to respect the rights of the Filipino people."*[48] The *Carbon Majors Inquiry* is to the date only quasi-judicial judgement which dealt with carbon majors (though only 47 private investor-owned) as a whole. The studies presented to the CHRP found that around 21,4 % of global emissions from fossil fuels and cement were from products

[45] See Heede (n 36) p 235.
[46] Ibid p 237.
[47] Frumhoff, Heede, Oreskes (n 34) pp 166-167.
[48] *Carbon Majors Inquiry* (Petition to CHRP of 22 September 2015, Case no. CHR-NI-2016-0001, "Petition") p 31 available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.

sold by carbon majors.[49] Emissions attributable to the 90 largest corporations contributed approximately 57 % of the rise of atmospheric CO_2, nearly 50 % of the rise in global average temperature and around 30 % of global sea level rise between 1880 - 2010. In the respective timeframe, carbon majors (in the narrower sense, meaning only private-investor owned companies) were responsible for around 16 % of the global average temperature increase and around 11 % of the global sea level. From 1980 till 2010, carbon majors have caused roughly 10 % of the global temperature increase and around 4 % of sea level rise.[50]

According to the CHRP, the carbon majors had *"early awareness, notice, or knowledge of their products' adverse impacts on the environment and climate system"*[51], at the latest (but as early as in the 1930s), in 1965.[52] Moreover, *"Carbon Majors engaged in willful obfuscation* [of climate science] *and obstruction to prevent meaningful climate action"*[53] and still continue in climate denial, intending to influence politics and slow down transition to renewable energy.[54]

Not only have carbon majors known about the impact of their activities to the climate system, their continuing activity accompanied by record profits is alarming the global community as well. In the *Paris Maligned*[55] study, the Carbon Tracker Initiative think-tank has disclosed that carbon majors, among them Chevron, Eni, Shell and TotalEnergies are investing into projects (some of those are already targeted by climate lawsuits, see lawsuit against Total in *subchapter 4.3.2*), which would satisfy demand for oil and gas in the scenario of global temperature increase beyond 2.5°C.[56] European companies Eni, Shell and TotalEnergies have published plans to decrease fossil fuel production, but they are not enough to meet the 1,5°C goal of the Paris Agreement. British Petrol is the only company, which plans to reduce both oil and gas production and is roughly consistent with the 1,5°C scenario.[57] North American companies Chevron and ExxonMobil both plan to increase their production.[58] Moreover, in the year 2022

[49] *Carbon Majors Inquiry* (Final Report of CHRP of 2022, Case no. CHR-NI-2016-0001, "Petition") p 99 available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.
[50] Ibid p 100 (according to the statement of Peter Frumhoff submitted to the CHRP)
[51] Ibid pp 100.
[52] Ibid p. 101.
[53] Ibid pp 104.
[54] Ibid p 110.
[55] See summary at Carbon Tracker Initiative, 'Oil and Gas Companies Invest in Production That Will Tip World Towards Climate Catastrophe' (Carbon Tracker Initiative, 8 December 2022) <https://carbontracker.org/oil-and-gas-companies-invest-in-production-that-will-tip-world-towards-climate-catastrophe/> accessed 25 September 2023.
[56] Ibid.
[57] Ibid.
[58] Ibid.

marked by the Russian aggression in Ukraine, global energy crisis and unprecedented inflation, carbon majors (namely so called "big five" - ExxonMobil, Chevron, Shell, BP and TotalEnergies) revealed record profits.[59]

Leaving a mere nation-state's responsibility towards climate change mitigation and integrating corporate entities into the scheme could potentially change the paradigm of climate change governance. In the next chapter, I will briefly outline the role of private players in the current international system.

1.2 Great power, but little responsibility? Corporations in the polycentric climate governance

"The case of climate change illustrates [...] *scale mismatch: the effects are global, but the authority to deal with them remains largely in the hands of national governments."*[60]

The fundamental role of fossil fuel corporations in causing (and therefore also, in potential - and in order to fulfil the goals of the Paris Agreement, necessary - mitigating) climate crisis is beyond doubt.

The Paris Agreement, unlike the Kyoto Protocol, is based on a "bottom-up" approach, which relies on nationally determined contributions (NDCs; Art. 3 Paris Agreement) of the nation states, which should be aligned to the overall mitigation goals of the treaty. This leaves more flexibility, as the strict division between "developed" and "developing" countries was abandoned by the Paris Agreement,[61] and potentially leaves more space for non-state actors.

In the recent years, there has been shift among scholars to view international climate governance under Paris Agreement as a more polycentric[62] (in contrast to more "monocentric"

[59] See The Guardian, '"Monster Profits" for Energy Giants Reveal a Self-Destructive Fossil Fuel Resurgence' (9 February 2023) <https://www.theguardian.com/environment/2023/feb/09/profits-energy-fossil-fuel-resurgence-climate-crisis-shell-exxon-bp-chevron-totalenergies> accessed 25 September 2023.

[60] John Gerard Ruggie, 'The social construction of the UN Guiding Principles on Business and Human Rights', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 68 <http://dx.doi.org/10.4337/9781786436405.00009> accessed 25 September 2023.

[61] Marie-Aure Perreaut Revial, 'International climate law', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) 334 <http://dx.doi.org/10.4337/9781786439710.00023> accessed 25 September 2023.

[62] See e.g., Elinor Ostrom, 'Polycentric systems for coping with collective action and global environmental change' (2010) 20(4) Global Environmental Change 550 <http://dx.doi.org/10.1016/j.gloenvcha.2010.07.004> accessed 25 September 2023.
Polycentric governance can be defined as a system in which *"political authority is dispersed to separately constituted bodies with overlapping jurisdictions that do not stand in hierarchical relationship to each other,"* see Andrew Jordan and others, 'Governing Climate Change Polycentrically', *Governing Climate*

or state-based approach of Kyoto Protocol)[63] sphere in a multi-stakeholder environment. From this perspective, "private governance" plays an important role in climate mitigation, by e.g. voluntary commitments to reduce emissions, complex systems for monitoring and trading in emissions, and efforts to disclose the carbon risks for businesses and investors.[64] The private initiative (led by e.g. industry associations and alliances) is independent from the state activity, but these two spheres, public and private, interact with each other.[65] Examples of private climate action which are supported by the UNFCCC regime are the Non-state Actor Zone for Climate Action or Lima-Paris Action Agenda.[66]

The polycentric approach might offer an optimistic view, as there is no need to rely on the activity of nation states (for example, municipalities and cities are described as progressive competitors in terms of GHG emissions reduction pledges and efforts).[67] However, fundamental questions remain, especially towards the role of carbon majors and in terms of practical implications for climate litigation.

Leaving the polycentric governance approaches aside, the traditional international law principles present substantial hurdles for holding the large fossil companies responsible for the GHG emissions they produce, namely for their limited international legal responsibility.[68] Looking again at the wording of the Paris Agreement, it mentions the private sector twice only, in Art. 6 Paris Agreement.

Scholars have identified various negative features of polycentric governance, such as contested accountability and weaker legitimacy, problem of free-riding and domination of powerful actors who are practically unaccountable.[69] International climate change framework is also

Change (Cambridge University Press 2018) p 11 <http://dx.doi.org/10.1017/9781108284646.002> accessed 25 September 2023, citing Skelcher 2005.

[63] Ibid p 6.

[64] See ibid p 8.

[65] Ibid.

[66] See Karin Bäckstrand, Fariborz Zelli and Philip Schleifer, 'Legitimacy and Accountability in Polycentric Climate Governance', *Governing Climate Change* (Cambridge University Press 2018) 345 <http://dx.doi.org/10.1017/9781108284646.020> accessed 26 September 2023.

[67] Jeroen van der Heijden, 'City and Subnational Governance', *Governing Climate Change* (Cambridge University Press 2018) 83 <http://dx.doi.org/10.1017/9781108284646.006> accessed 26 September 2023.

[68] Mark A. Drumbl and Kateřina Uhlířová, 'Actors and law-making in international environmental law', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) 3 <http://dx.doi.org/10.4337/9781786439710.00008> accessed 26 September 2023.

[69] See ibid.

often criticised[70] for its soft-law[71] character (this criticism is even more relevant for "obligations" of the corporate sector, see *Part 3* below). There is no direct obligation for the carbon majors to reduce their emissions under the national or transnational regulatory mechanisms, rather - they are obliged merely by disclosure requirements and market-based or "corporate social responsibility" (see *Chapter 3.1*) voluntary mechanisms.[72] For example, examination of five UK carbon majors has shown that only one of five energy companies examined have absolute GHG reduction targets.[73]

1.3. Preliminary conclusion

In this introductory part, I have shown the fundamental role of carbon majors in changing the climate system (while influencing the political system and confusing the public), as well as the limits of the current climate change law regime. Polycentric climate change governance, though acknowledging the various efforts of non-state actors in mitigating the crisis, does not solve the problem of low accountability of the major private sector pollutants. Identifying the sources of responsibility is crucial to the successful climate change litigation of the corporate actors. This will be the goal of *Part 3.* Before that, I will examine the environmental (and climate) dimension of human rights and describe human rights violations of the fossil fuel industry.

[70] Marie-Aure Perreaut Revial, 'International climate law', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) 329 <http://dx.doi.org/10.4337/9781786439710.00023> accessed 26 September 2023.
[71] For soft-law as a source of international environmnetal law, see Drumbl and Uhlířová (n 68), 27.
[72] Lisa Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5(2) Transnational Environmental Law 353, pp 354-355 <http://dx.doi.org/10.1017/s2047102516000194> accessed 26 September 2023.
[73] Ibid p 376.

2. Climate change, human rights, and activity of corporations

2.1 Climate change - a human rights issue

Impact of the climate crisis on human rights is not controversial anymore[74] and urgency to deal with human rights consequences of the changing climate was highlighted by the latest IPCC report. Among other hazards and risks, IPCC identifies an increase in heat-related human mortality and morbidity, rise of diseases and mental health challenges, as well as flooding in coastal regions, biodiversity loss, decrease in food production in some regions and rain-generated local flooding.[75]

According to the 2009 report of the UNs Office of the High Commissioner on Human Rights (OHCHR), the rights most affected by climate change are right to life, adequate food, water, health, adequate housing and self-determination.[76] Since the 1972 Stockholm Declaration[77] (See Principle 1 of Stockholm Declaration), we can trace the tendency towards "greening" of universal human rights on national, regional and international level. On a national level, there are around 100 national constitutions recognizing the right to a healthy environment,[78] and *"nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally guaranteed human rights."*[79]

In Europe, the European Court of Human Rights (ECtHR) plays an important role in developing an extensive body of case-law related to the environment.[80] Although the European Convention on Human Rights (ECHR) does not protect the environment as such, it is considered essentially in three cases: 1) adverse environmental factors directly affect the human rights protected by the ECHR, 2) adverse environmental factors may give rise to certain

[74] Hana Müllerová, 'Mezinárodní právo lidských práv a klimatická změna' *Klimatické právo* (Wolters Kluwer 2022) p 190.
[75] IPCC (n 6) p 15.
[76] 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' (15 January 2009) A/HRC/10/61.
[77] Dinah Shelton, 'Human rights and the environment: substantive rights', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010) p 265.
[78] David R Boyd, 'Catalyst for Change', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 18 <http://dx.doi.org/10.1017/9781108367530.002> accessed 26 September 2023.
[79] Shelton (n 77) p 278.
[80] See Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) pp 86-87 <http://dx.doi.org/10.1017/9781108367530.005> accessed 26 September 2023.

procedural rights for the individual concerned ad 3) the protection of the environment may also be a legitimate aim justifying interference with certain individual human rights.[81]

To what extent is greening of "traditional" human rights (as those enshrined in the ECHR) or establishment of specific environmental human rights relevant to the protection of climate, is often less clear. On international level, Paris Agreement mentions human right aspect only in its preamble[82] and recognizes and seeks protection for vulnerable groups,[83] while taking procedural rights into account.[84] In 2019, the issue was highlighted by adoption of the HRC's resolution (A/HRC/RES/41/21) on "Human Rights and Climate Change." Pioneering case of applying human rights on climate change was 2005 *Inuit Petition*[85] before the Inter-American Commission on Human Rights (IACHR). As of July 2023, the three climate lawsuits *(Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, *Carême v France* and *Duarte Agostinho and Others v Portugal)* are waiting for the assessment of the ECtHR, so the potential climate jurisprudence of the ECtHR remains unclear.[86] In national jurisdictions, the tendency to use human rights argumentation (both based on international and national human rights instruments) was coined as the "human rights turn."[87] This tendency is most exposed in - but not limited to (as also demonstrated later by this work) - the litigation against governments (so called *Urgenda*-style cases[88] - inspired by the pioneering Dutch case). For example, Dutch courts did base their decision mainly on Art. 2 and Art. 8 ECHR, whereas the Municipal Court

[81] See Council of Europe, 'Manual on Human Rights and the Environment (3rd edition)' (Council of Europe, February 2022), pp 7-8, <https://rm.coe.int/manual-environment-3rd-edition/1680a56197> accessed 26 September 2023.
[82] Lavanya Rajamani, 'Human Rights in the Climate Change Regime', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) p 237 <http://dx.doi.org/10.1017/9781108367530.013> accessed 26 September 2023.
[83] Ibid pp 247-248.
[84] See Sumudu Atapattu, 'The Right to a Healthy Environment and Climate Change', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) pp 258-259 <http://dx.doi.org/10.1017/9781108367530.014> accessed 26 September 2023.
[85] Ibid 256; *Inuit Petition* (Petition N° P-1413-05, IACHR, 7 December 2005); see summary at Climate Case Chart, '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' (Sabin Center for Climate Change Law) <http://climatecasechart.com/non-us-case/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/> accessed 26 September 2023.
[86] See Müllerová (n 74) pp 210-211.
[87] See Peel and Osofsky (n 18).
[88] See Joana Setzer and Catherine Higham 'Global Trends in Climate Change Litigation: 2023 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, June 2023) p 5 <lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf> accessed 26 September 2023.

in Prague has decided that Czech ministries (*Klimatická žaloba ČR v Czech Republic*)[89] has violated the right to a healthy environment (*"právo na příznivé prostředí"*) enshrined in the Art. 35 of the Czech Charter of Fundamental Rights and Freedoms.

Human rights have a twofold meaning for climate protection - they can on one hand, build the base for claiming climate protection, on the other hand, they represent limits for policies to protect climate.[90] The perspective of this work will focus on the first implication of the human rights-climate change relationship, but one has to keep in mind that the second aspect might represent a substantial hurdle to attempts to limit harmful activity of corporations, which could interfere with their economic or ownership rights.

Yet there is another paradox - climate change is caused predominantly by human activity and at the same time, it has and increasingly will have adverse consequences on lives of the world population. But the people most affected are not those most guilty of rising GHG emissions. This is not only a question of justice among different nations (Global North vs Global South), but also of the impacts of corporate activities on communities and local ecosystem in the globalised world. In the next subchapter, I will focus on these human rights abuses.

2.2 Human rights abuses of (fossil fuel) corporations

"[environment in Ogoniland was] *"completely devastated by three decades of reckless oil exploitation or ecological warfare by Shell.... An ecological war is highly lethal, the more so as it is unconventional. It is omnicidal in effect. Human life, flora, fauna, the air, fall at its feet, and finally, the land itself dies."*[91]

In a world of economic globalisation of a united world market system,[92] some argue that state sovereignty is weakened, with implications for both human rights and the environment.[93] Since

[89] *Klimatická žaloba ČR v Czech Republic*, Judgement (*rozsudek*) of Municipal Court of Prague of 15 June 2022, č. j. 14A 101/2021 – 248. See summary at Climate Case Chart (Sabin Center for Climate Change Law) http://climatecasechart.com/non-us-case/klimaticka-zaloba-cr-v-czech-republic/> accessed 26 September 2023; the case was overturned by the Czech Supreme Administrative Court and is, as of September 2023 pending at the Municipal Court.
[90] See [in German] Walter Frenz, 'Querschnittsthemen', *Klimaschutzrecht* (Erich Schmidt Verlag GmbH & Co. KG 2022) pp 110-111.
[91] Ken Saro-Wiwa, cited in Human Rights Watch (HRW), *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW 1999) p 52 <https://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> accessed 26 September 2023.
[92] See Kerri Woods, *Human rights and environmental sustainability* (Edward Elgar Publishing 2010) p 5.
[93] See ibid p 6.

the 1970s, accelerating globalisation[94] and the rise of multinational corporations (or transnational corporations, TNCs) have come hand in hand with decrease of governmental control over corporate activities,[95] described by some scholars as "governance gaps."[96] Stoett and Omrow operate with a term of "transnational ecoviolence", defined as a *"human activity that threatens environmental justice and human security, usually (but not always) in violation of formal law, across geopolitical borders."*[97]

There are countless examples of corporate influence on human rights, but few incidents and activities raised awareness of the whole problem to the public. Bhopal catastrophe of 1984, a gas leakage in a factory of a US-subsidiary, whose outcome were several thousand deaths and hundreds of thousand people with lasting health damage,[98] is an emblematic case, because it shows Global-North and Global-South inequalities, as well as significant hurdles for victims[99] of harmful activity of TNCs to access justice. Another aspect is the relationship between the TNCs and undemocratic states. In this respect, controversial corporate activities in the apartheid regime in South Africa brought attention to the global public in the 1970s and 1980s.[100] In recent years, Rana Plaza collapse in Bangladesh is another catastrophic symbol and shaped discussion of the (not only) textile business and human rights relationship sector in the 21st century.[101]

Fossil fuel corporations and other major GHG emitters (cement and automobile industry) are among the most influential TNCs in the current economic and political system, which is *nota bene* built and dependent on extracting and processing fossil fuels. Historically, "*oil extraction has gone along with the most ruthless and open imperial violence, with repeated warfare* [...],

[94] See also Commission on Human Rights (CHR), 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006), E/CN.4/2006/97, pp 4.
[95] See Florian Wettstein, 'The history of business and human rights and its relationship with corporate social responsibility', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) p 25 <http://dx.doi.org/10.4337/9781786436405.00007> accessed 26 September 2023.
[96] See ibid; see also UN Human Rights Council (HRC), 'Protect, respect and remedy : a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) A/HRC/8/5, para 3.
[97] Peter Stoett and Delon Alain Omrow, 'Transnational Ecoviolence and Crime: Revisiting Environmental Justice and Human Security', *Spheres of Transnational Ecoviolence* (Springer International Publishing 2020) p 30.
[98] See Wettstein (n 95) p 26.
[99] See ibid p 27.
[100] See ibid p 25.
[101] See e.g. Anil Hira and Maureen Benson-Rea (eds), *Governing Corporate Social Responsibility in the Apparel Industry after Rana Plaza* (Palgrave Macmillan US 2017) <http://dx.doi.org/10.1057/978-1-137-60179-7> accessed 26 September 2023.

and with a sort of lawlessness characteristic of the corporate frontier."[102] Extraction of fossil fuel, especially oil, has a major impact on the local environment and communities, as well as on politics. Influence of carbon majors on state institutions is aptly described by the term petro-state. Petro-state is a state overly dependent on oil extraction, which often comes together with widespread corruption, limited enforcement of environmental regulation and human rights violations.

Impact of carbon majors in the sphere of human rights is, basically, twofold. Firstly, their worldwide operation is responsible for a significant share of total GHG emissions (as shown in *chapter 1.1*), which exacerbate the ongoing climate crisis which has adverse human rights implications (as shown in *chapter 2.1*). Secondly, their activities at various stages of the supply chain (such as extraction) have other, more direct human rights consequences. Carbon majors like Shell are often cited as an example of a large multinational corporation and its extraterritorial impacts on the environment and living conditions of local communities.[103] The core of this thesis deals with the first aspect (overall emissions), which corresponds with the aim of the most well-known climate lawsuits (see below *chapter 4.1*). However, especially the activity of fossil fuel TNCs in the Global South needs brief mention, as it is not possible to separate it from the overall global picture, and it played an important role in developing the "business and human rights" (BHR, see *Part 3*) movement.[104] Scale of fossil fuel TNCs impact is illustrated by a survey of Special Representative of the Secretary-General John Ruggie - two thirds of 65 cases of corporate human rights violations examined were attributed to the extractive sector (oil, gas and mining).[105]

Human rights abuses connected to the fossil fuel TNCs activities are diverse.[106] In the upstream stage (when exploration and production of e.g. oil takes place)[107] of the supply chain, most evident is the violation of environmental and health rights (caused by *"oil spills, blowouts, hydrocarbon releases around refinery and oil installations, and the consequences of gas*

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[102] Michael J Watts, 'Righteous oil? Human rights, the oil complex, and corporate social responsibility' (2005) 30(1) Annual Review of Environment and Resources 373, 380 <http://dx.doi.org/10.1146/annurev.energy.30.050504.144456> accessed 26 September 2023, citing Yergin (1991).
[103] See Natasha Affolder, 'Square Pegs and Round Holes?', *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) p 12.
[104] See Wettstein (n 95) p 28.
[105] See CHR (n 94) p 8.
[106] See list in Watts (n 102) pp 388.
[107] Adam Hayes, 'What Is Upstream in the Oil and Gas Industry?' (Investopedia, 12 June 2022) <https://www.investopedia.com/terms/u/upstream.asp> accessed 26 September 2023.

flaring").[108] Local communities are directly affected by the extraction activities, which leads to indigenous rights violations and deprivation of access to land and resources. The list of accusations further includes worker and labour rights, issues connected to the poor governance (corruption and fraud[109], transparency and accountability issues) and unstable circumstances in the upstream countries (civil wars, interstate conflict, military governments or undemocratic regimes).[110] Savaresi and McVey have developed typology of these abuses, and distinguish between direct or indirect violations of substantive (right to life, health, adequate housing and food etc.) or procedural rights (access to remedy, access to justice, access to information, participation).[111]

2.3 Three case studies

"The oil companies and the communities they operate in occupy two different worlds, geographically overlapping but conceptually light-years apart."[112]

Three cases concerning carbon majors' (Shell, Total and Chevron) operation in extraction of oil illustrate many of the aspects described above. According to the *Carbon Majors Report 2017*, Shell accounted for 1,7 % of cumulative industrial emissions between 1988 and 2015, Chevron for 1,3 % and Total for 0,9 %.[113]

2.3.1 Shell in Nigeria

Oil and gas extraction influences Nigerian environment, society, and politics since 1956.[114] Environmental degradation in the context of a close connection of TNCs and the state in Niger Delta (Ogoniland) in Nigeria has become a symbol of environmental (in)justice. Oil spills and hydrocarbon pollution due to outdated infrastructure and sabotage, infrastructure development and inefficient "gas flaring" are the main drivers of environmental degradation.[115] The political

[108] Watts (n 102) p 388.
[109] See e.g. accusations against Shell and Eni in Nigeria: Reuters, 'Italian court acquits Eni and Shell in Nigerian corruption case' (Reuters, 18 March 2021) <https://www.reuters.com/article/uk-eni-shell-nigeria-idUSKBN2BA0XF> accessed 26 September 2023.
[110] See Watts (n 102) pp 387-393.
[111] Annalisa Savaresi and Marisa McVey, 'Human Rights Abuses by Fossil Fuel Companies' (350.org, 7 February 2020) pp 23 <https://350.org/press-release/climate-crisis-is-aggravating-human-rights-violations-caused-by-the-fossil-fuel-industry-alerts-350-org-report/> accessed 26 September 2023.
[112] Human Rights Watch (HRW), *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW 1999) p 183 <https://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> accessed 26 September 2023
[113] Appendix I of the report: Griffin (n 39) p 14.
[114] HRW (n 112) p 7.
[115] See ibid pp 52-68.

conflict escalated in the 90s, which saw brutal suppression of peaceful movement of the local communities affected by the exploitation and even judicial murder of Ogoni leaders including Ken Saro-Wiwa. Execution of so-called "Ogoni Nine" was a "public relations disaster"[116] to Shell and other Corbon Majors active in Ogoniland (among the Nigeria-based NNPC Limited, also French TotalEnergies or Italian Eni, as well as US-based Chevron and Exxon via their subsidiaries).[117] From today's perspective, the death of Saro-Wiwa and others is assessed as an important driver to establish a BHR movement.[118]

Role of Shell[119] (through its subsidiary, Shell Petroleum Development Company, SPDC) in the crisis and connection to the Nigerian authorities is well reported.[120] Shell has historically a privileged position (in 1999 it produces around 50 % of Nigerian crude oil)[121] in Nigeria connected to the colonial past of British rule.[122]

The situation led to a number of lawsuits in Nigeria (*Gbemre v SPDC*),[123] the Netherlands (*Oguru et al. v Shell et al.*)[124] and the UK (*Ogale & Bille Communities v Shell et al*).[125] Both Dutch and UK courts held in upper instances Shell plc (the mother company) liable for its upstream activities, while in Nigeria, regulation and its enforcement is weak.[126]

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[116] Watts (n 102) p 399.
[117] Wikipedia, 'Petroleum Industry in Nigeria' <https://en.wikipedia.org/wiki/Petroleum_industry_in_Nigeria> accessed 26 September 2023.
[118] See Wettstein (n 95) p 27.
[119] At the beginning of 2022, former Royal Dutch Shell (RDS) has changed its name to Shell plc, see Shell, 'Royal Dutch Shall plc Changes its Name to Shell plc' (Shell, 21 January 2022) <https://www.shell.com/media/news-and-media-releases/2022/royal-dutch-shell-plc-changes-its-name-to-shell-plc.html> accessed 26 September 2023, hand in hand with its relocation to London: The Guardian, 'Shell's plan to move HQ to London gets Dutch backlash' (The Guardian, 15 November 2021) <https://www.theguardian.com/business/2021/nov/15/shell-move-hq-tax-netherlands-uk> accessed 26 September 2023.
[120] HRW (n 112) pp 145.
[121] HRW (n 112) p 7.
[122] Jêdrzej George Frynas, Matthias P Beck and Kamel Mellahi, 'Maintaining corporate dominance after decolonization: the 'first mover advantage' of Shell-BP in Nigeria' (2000) 27(85) Review of African Political Economy 407, <http://dx.doi.org/10.1080/03056240008704475> accessed 26 September 2023.
[123] Climate Case Chart, 'Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others' (Sabin Center for Climate Change Law) <http://climatecasechart.com/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/> accessed 26 September 2023.
[124] See Business & Human Rights Resource Centre, 'Shell lawsuit (re oil pollution in Nigeria)' (Business-humanrights.org) <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/> accessed 26 September 2023.
[125] See Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Ogale & Bille communities in Nigeria - Okpabi v Shell)' (Business-humanrights.org) <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell/> accessed 26 September 2023.
[126] See HRW (n 112) p 52.

2.3.2 Total in Bolivia and East Africa

Total E&P (subsidiary of French-based carbon major TotalEenegies SE, shortly also Total) is one of the corporations operating in gas extraction in Bolivia. Many gas exploration, exploitation and transportation projects affect indigenous Guaraní communities, infringing their "rights to fair compensation, employment, and water." Total's communication and negotiation with indigenous communities has been described as "divide and rule" with intention to weaken indigenous organisations. Dependence of the Bolivian state on natural gas export makes defending indigenous rights very difficult.[127]

In Africa, Total is not only active in Nigeria, but mainly in East Africa. East African crude oil pipeline (EACOP) project between Uganda and Tanzania, currently under construction, is one example. The project has met criticism for its contribution to the climate change (exceeding annual contributions of both host countries),[128] as well as for its environmental and social impact, leading e.g. to physical and economic displacement and food shortages.[129] Example of often overlooked consequence of fossil fuel extraction projects is violence of women's rights, which are not reflected in standard social and environmental impact assessments.[130] Controversial project was confronted by the #StopEACOP campaign.[131]

Total's activities were already challenged by NGOs under the French Vigilance Act (see *chapters 3.3* and *4.3*).

2.3.3 Texaco/Chevron in Ecuador

In the Western hemisphere, similar relationships on the North-South axis can be studied on an example of US-based Texaco/Chevron in Ecuador. In the late 1960s, US corporation Texaco (later acquired by Chevron), discovered and started extracting oil in the Oriente region in

[127] See case study in Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2020) 22 Human Rights Review pp 118-120 <http://dx.doi.org/10.1007/s12142-020-00607-9> accessed 26 September 2023.
[128] The Guardian, ''Monstrous' east African oil project will emit vast amounts of carbon, data shows' (The Guardian, 27 October 2022) <https://www.theguardian.com/environment/2022/oct/27/east-african-crude-oil-pipeline-carbon> accessed 26 September 2023.
[129] See Tom Ogwang and Frank Vanclay, 'Cut-off and forgotten?: Livelihood disruption, social impacts and food insecurity arising from the East African Crude Oil Pipeline' (2021) 74 Energy Research & Social Science 101970 <http://dx.doi.org/10.1016/j.erss.2021.101970> accessed 26 September 2023.
[130] See Christina Hill and others, 'Hidden in plain sight: gender analysis of the environmental and social impact assessment of the East African Crude Oil Pipeline' (2021) 39(3) Impact Assessment and Project Appraisal 229 <http://dx.doi.org/10.1080/14615517.2021.1904696> accessed 26 September 2023.
[131] See Stop EACOP, 'Stop EACOP' <https://www.stopeacop.net/home> accessed 26 September 2023.

Amazon.[132] *"Serious illnesses, water contamination, and ecological destruction"* has affected the lives of tens of thousands of people.[133] Texaco/Chevron operations spilled about "80 times more oil than was spilled in BP's [British Petrol's] 2010 Deepwater Horizon disaster."[134]

Since 1993, the legal battle[135] of Ecuadorian citizens against Texaco/Chevron has been immensely complex. In short, Texaco/Chevron challenged the jurisdiction of US courts and later accepted Ecuadorian jurisdiction. However, Chevron refused to accept the 2011 judgement of the Ecuadorian court,[136] which was unfavourable for the corporation, attempted to delegitimize the ruling and returned to the US - and achieved US court to proclaim the Ecuadorian ruling to be unenforceable because of alleged fraud. Famously, human rights defender and attorney on behalf of Ecuadorian plaintiffs Steven Donziger was charged with criminal contempt of court by highly unusual circumstances, which were described as a "judicial harassment,"[137] and ultimately *"lost his law license, income, spent hundreds of days under house arrest in New York, and in 2021 was sentenced to six months in prison."*[138] The behaviour of Chevron is described by human rights NGOs as a "strategic lawsuit against public participation,"[139] so called SLAPP, which is notorious for fossil fuel corporations.[140]

Notwithstanding the development in the US, plaintiffs unsuccessfully attempted to enforce the Ecuadorian judgement in other jurisdictions.[141] Thus, neither remediation of the oil contamination, nor compensation for the victims were achieved.[142]

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[132] Robert V. Percival, 'Transnational litigation: what can we learn from Chevron–Ecuador?', *Research Handbook on Transnational Environmental Law* (Edward Elgar Publishing 2020) 319 <http://dx.doi.org/10.4337/9781788119634.00031> accessed 26 September 2023.
[133] Indirect citation in Watts (n 102) p 374.
[134] The Guardian, 'This lawyer should be world-famous for his battle with Chevron – but he's in jail' (The Guardian, 8 February 2022) <https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich> accessed 26 September 2023.
[135] See overview in e.g. Business and Human Rights Resource Centre, 'Texaco/Chevron lawsuits (re Ecuador)' (Business-humanrights.org) <https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/> accessed 26 September 2023; Percival (n 132); Detailed information could be found in book Suzana Sawyer, *Small Matter of Suing Chevron* (Duke University Press 2022).
[136] *Maria Aguinda y Otros v Chevron Corp.*, No. 002-2003 (Provincial Court of Justice of Sucumbios 2011).
[137] The Guardian (n 134).
[138] Ibid.
[139] Amnesty International, 'USA: After almost 1,000 days of arbitrary detention, Steven Donziger's release highlights urgent need for action against SLAPPs' (Amnesty.org, 25 April 2022) <https://www.amnesty.org/en/latest/news/2022/04/usa-steven-donzigers-release/> accessed 26 September 2023.
[140] EarthRights International, 'THE FOSSIL FUEL INDUSTRY'S USE OF SLAPPS AND JUDICIAL HARASSMENT IN THE UNITED STATES' (Earthrights.org, September 12 2022) <https://earthrights.org/publication/the-fossil-fuel-industrys-use-of-slapps-and-judicial-harassment-in-the-united-states/> Accessed 26 September 2023.
[141] See Percival (n 132) p 330.
[142] Ibid p 333.

2.3 Preliminary conclusion: Challenges addressing corporate human rights/environmental violations and two sides of globalisation

"[T]*he corporation is a pathological institution, a dangerous possessor of the great power it wields over people and societies."*[143]

Human rights dimension of environmental degradation is already given, but the context of fossil fuel corporations' worldwide operation poses numerous challenges to address these abuses effectively. While this thesis deals primarily with the overall impact of GHG emissions, it was important, in my view, to show the whole story of human rights violation along the corporate supply chain, which unequally affects the societies of the upstream countries of the South. Implications of the thorough analysis are dire: Not only are (and increasingly will be) the societies of the South most impacted by the consequences of climate change, but they are already impacted by corporate exploitation of resources located in their territory. Laurie Parsons describes this unequal global reality as a "carbon colonialism", noting that *"climate change is a global problem, but local economic and industrial factors play a major role in shaping its harms."*[144] Human rights litigations addressing precisely these local adverse impacts have made a case for taking corporate human rights' abuses seriously.

The aforementioned cases illustrate many general problems of corporate accountability vis-á-vis its environmental harm, which applies to the climate context as well. There is an inherent conflict between the corporate legal structure and the desire of regulators and victims to hold corporations liable.[145] Thus, the fictitious personality, which is essentially a construct of national legal systems, is itself a hindrance for establishing corporate liability for environmental harm.[146]

Most of the challenges stem from the *transnationality* of TNCs operation. Firstly, this poses jurisdictional challenges (as illustrated e.g. by the Texaco/Chevron case). Insufficient regulation and poor legal system in host countries may lead victims to litigate in TNCs home country, where the *forum* might be unclear. Secondly, limited liability and the structure of the corporate group and relationship of the parent company with its subsidiaries in host countries

[143] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press 2004).
[144] Laurie Parsons, *Carbon Colonialism* (Manchester University Press 2023) p 7.
[145] See Amanda Perry-Kessaris, 'Corporate Liability for Environmental Harm', *Research Handbook on International Environmental Law.* (Edward Elgar Publishing 2010) 361 <https://doi.org/10.4337/9781849807265.00028> accessed 26 September 2023.
[146] See ibid pp 361-363.

(that is, in practice, proving a certain degree of parent company's control over its subsidiary) makes transnational litigation difficult. This is important, as *"the parent company [...] may be the only entity with enough assets available to compensate victims or pay fines."*[147] Or, in case of climate litigation, the parent company might be the only entity to ensure that the whole group will be aligned with the global mitigation objectives.

Lastly, TNCs' power and influence represent another challenge itself. There is, in my opinion, no more telling example than the Texaco/Chevron in Ecuador litigation 'Odyssey' described above: *"Chevron hired more than 60 law firms and more than 2,000 legal professionals, spending hundreds of millions of dollars, an amount well in excess of the $140 million settlement that an attorney for the Lagio Agrio plaintiffs proposed in 1999. Yet Chevron officials apparently believe that they are on a larger mission to deter future lawsuits by environmental plaintiffs hoping for generous settlements from a company that now generates $160 billion a year in annual revenue. Chevron's scorched earth litigation strategy sought to exploit the corporation's wealth to overwhelm the plaintiffs."*[148]

In the context of climate litigation, main issues, in a way, overlap with the human rights litigations against fossil corporations described in *chapter 2.3* In order to achieve the goal of establishing emission reduction obligations of carbon majors, it is necessary to prove a link of the parent company to its subsidiaries, thus reaching the whole corporate group. Of course, climate-specific questions arise, such as causality (between emitting and alleged harm) and questions of which emissions are attributable to the corporation (which I will call a *carbon accounting question*).

Human rights violations of TNCs (namely fossil fuel TNCs) cannot be separated from both local (water/soil etc. environmental degradation) and global (climate change and other changes of Earth system) environmental harm. In the wake of the environmental crisis, enhancing accountability of TNC is urgent, but at the same time, challenging.

The power and impact of TNCs (and their contribution to climate change and other global crises) is one side of globalisation. Another side is the international system of universal human rights. In the next Part, I will map the human rights basis for corporate responsibility and other potential sources.

[147] See ibid p 366.
[148] Percival (n 132) p 333.

3. Sources of (human rights) obligations and climate due diligence

"The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[149]

Aim of this Part is to present main potential sources of corporate accountability, which could be used as a way to hold corporations responsible for their contribution to the climate crisis, as well as to the other consequences connected to their activities, which were described in the previous subchapter. Core of the analysis are the human rights obligations, but other approaches will be addressed as well, to offer a border basis for the subsequent analysis of climate litigation. Moreover, the human rights approach has its limits (not only) in the context of climate change litigation.

In the first chapter, I will compare two general approaches to corporate responsibility - *corporate social responsibility (CSR)* and *business and human rights (BHR).* In *chapter 3.2*, I will describe the evolution and current state of international (soft) law based on CSR and BHR. In *3.3*, I focus on human rights due diligence (HRDD), a way how the international framework translates into (supra)national law. Finally, I will outline a bigger picture of potential basis for corporate accountability in light of three previous chapters.

Compared to climate change governance, the domain of *business and human rights* is similarly 'polycentric,'[150] as the traditional public law of national states is less effective to deal with downsides of globalisation. Ruggie identifies three key areas: 1) traditional system of (international and domestic) public law and governance, 2) civil governance involving stakeholders concerned about adverse effects of business conduct and employing various social compliance mechanisms, such as advocacy campaigns, lawsuits, and other forms of pressure, but also partnering with companies to induce positive change and 3) corporate governance, which internalizes elements of the other two and shapes enterprise-wide strategy and policies, including risk management.[151]

[149] UN Human Rights Council (HRC), 'Protect, respect and remedy : a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) A/HRC/8/5, para 3.
[150] Ruggie (n 60) p 85.
[151] Ibid pp 73.

3.1 Between responsibility and obligation: From corporate social responsibility to business and human rights

The relationship between business and human rights has evolved in the last decades. Deva distinguishes three eras, which he describes as *"business or human rights,"* the *"business and human rights"* (BHR) and the *"business of human rights"* eras.[152] Alternatively, human rights advocates as well as businesses themselves use the broader term corporate social responsibility (CSR).

Although built on the similar premise (contrary to the view of (neo)liberals like Milton Friedman) of *"corporations having responsibilities beyond their shareholders"*[153], BHR and CSR differ *"regarding the normative basis of corporate responsibilities, the nature and extent of these responsibilities, the process of identifying individuals and communities to whom responsibilities are owed, and the modus operandi of enforcing corporate responsibilities in cases of noncompliance."*[154]

3.1.1 Corporate Social Responsibility

CSR emerged in the 1950s as a management idea.[155] Beal offers a broad definition: *"CSR* [...] *is the moral and practical obligation of market participants to consider the effect of their actions on collective or system-level outcomes and to then regulate their behavior in order to contribute to bringing those out-comes into congruence with societal expectations."*[156]

According to the Green Paper 'Promoting a European Framework for Corporate Social Responsibility' of 2001[157] issued by the European Commission (EC), CSR is described as a *"concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."*[158] In its new definition, EC is brief, defining CSR as *"the responsibility of enterprises for their impacts on*

[152] Surya Deva, 'From business or human rights to business and human rights: what next?', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) p 1 <http://dx.doi.org/10.4337/9781786436405.00005> accessed 26 September 2023.
[153] Ibid p 2.
[154] Ibid.
[155] Stéphanie Bijlmakers, *Corporate social responsibility, human rights and the law*. (Routledge 2018) p 2 <https://doi.org/10.4324/9781351171922> accessed 17 April 2022.
[156] Brent D Beal, *Corporate social responsibility: definition, core issues, and recent developments* (SAGE 2014) p 5.
[157] European Commission, 'GREEN PAPER: Promoting a European framework for Corporate Social Responsibility' (Green Paper), COM(2001) 366.
[158] Ibid para 20.

society"[159], identifying two key aims of CSR: *"(1) maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large; (2) identifying, preventing and mitigating their possible adverse impacts."*[160]

Most importantly, CSR is traditionally viewed as a company-driven and voluntary[161] practice of business self-regulation, e.g. by adoption of corporate codes of conduct and CSR reports.[162] The term *responsibility* (as opposed to *obligation* or *accountability*) itself implies voluntary and non-binding character (rather "expectation of desirable conduct" by the society) of the duties.[163] Thus, the CSR approach corresponds to the Deva's 'business or human rights' era. Nevertheless, CSR has seen fundamental development from the side of the businesses, as a result of a combination of corporate disasters and the growing effectiveness of human rights advocacy networks,[164] and thus overlaps in the tendency to move towards BHR.

3.1.2 Business and Human Rights

Roots of more "solid" Business and Human Rights can be traced to the early 1970s. As the first[165] authoritative body to acknowledge the problem, the UN published a study "Multinational Corporations in World Development"[166] in 1973. Both Organisation for Economic Co-operation and Development (OECD)[167] and International Labor Organisation (ILO)[168] released soft-law norms in the following years. Moreover, incidents like the 1984 Bhopal disaster or killing of Ogoni leaders in Nigeria in 1995 described above further enhanced the debate.[169]

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[159] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility', COM (2011) 681, p 6.
[160] Ibid.
[161] Bijlmakers (n 155) 2.
[162] Justine Nolan and Dorothée Baumann-Pauly, *Business and Human Rights: From Principles to Practice* (Taylor & Francis Group 2016) pp 4.
[163] See [in Czech] Monika Feigerlová, '"Klimatická odpovědnost" společností', *Klimatické právo* (Wolters Kluwer 2022) 621.
[164] Watts (n 102) p 394.
[165] FI Nixson and M Yamin, 'The United Nations on transnational corporations: a summary and a critique' (1980) 6(1) British Journal of International Studies 16, 1 <http://dx.doi.org/10.1017/s0260210500114883> accessed 26 September 2023.
[166] UN Department of Economic and Social Affairs, 'Multinational corporations in world development' (1973) ST/ECA/190.
[167] OECD Guidelines for Multinational Enterprises (1976) <https://www.oecd.org/els/emp/guidelinesformultinationalenterprises.htm> accessed 30 September 2023, see Deva (n 152) p 3.
[168] MNE Declaration (1977), <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm> accessed 30 September 2023.
[169] See overview in Wettstein (n 95) pp 23-45.

Real development of BHR is associated to the 1990s,[170] this approach has been shifting towards a more complex regulatory framework under the influence of human rights advocacy. In the BHR discourse, human rights are treated as an end goal, not as a part of a broader agenda.[171] In contrast to more self-regulative CSR, BHR approaches evaluate corporate conduct in light of universal human rights principles codified in international treaties,[172] aiming at "*holding corporations accountable for harm caused rather than on a positive recognition of the role business might play in protecting and promoting human rights."*[173] BHR shifts the debate from corporate voluntarism *"more into the realm of binding law, state-sponsored oversight, and the importance of access to remedy as a measure of corporate accountability."*[174]

To sum up, despite the common premise, it is important to make a distinction between CSR and BHR. CSR emerged from the scholarship of the business academy, while BHR is based on human rights legal academics and civil advocacy.[175] CSR advocates are content with self-regulation and mere *responsibility*, whereas BHR proponents are more ambitious, aiming at *accountability* and hard-law *obligations*. BHR, thus, can be viewed as a critical response[176] towards the mainstream CSR supported by the corporations themselves. Insufficiency of CSR can be illustrated, again, in an example of Shell's activity in Nigeria (see below). BHR itself is a subject of criticism (which is summarised by Deva as a "business of human rights,"[177] which could be understood as human rights' internalisation for the advantage of the corporate).

3.1.3 Corporate Climate Responsibility? Business, human rights and climate?

The trend to view a company's responsibility beyond its shareholders and take into account its influence on other stakeholders (e.g. employees, customers, local communities) is broadened to the environment itself.[178] Among the CSR discourse, Elkington's accounting framework Triple Bottom Line introduced three "pillars" of CSR - economic, social and environmental.[179]

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[170] See Baumann-Pauly and Nolan (n 162). pp 3, 22.
[171] Bijlmakers (n 155), p 3.
[172] Ibid.
[173] Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14(2) Journal of Human Rights 236, p 237 <http://dx.doi.org/10.1080/14754835.2015.1037953> accessed 26 September 2023. Citing Bilchitz.
[174] Ibid.
[175] Ibid p 237.
[176] See Wettstein (n 95) pp 23, 35.
[177] See Deva (n 152) pp 5.
[178] See Rolf H Weber and Andreas Hösli, 'Corporate Climate Responsibility – The Rise of a New Governance Issue' (2021) sui generis 83, p 85 <http://dx.doi.org/10.21257/sg.171> accessed 26 September 2023.
[179] See [in Czech] Petra Koudelková, *Společenská odpovědnost firem a organizací: udržitelně o udržitelnosti* (Ekopress 2022) p 16; John Eklington, *Cannibals Wit Forks: The Triple Bottom Line of 21st Century Business*

Another CSR initiative, "Environmental, social and corporate governance" (ESG) aims at aligning investment with environmental and other goods. It is integrated e.g. into the UN-supported Principles for Responsible Investment (UN PRI).[180]

Some authors propose[181] to specify the responsibility of companies in the context of climate change governance and use the term Corporate Climate Responsibility (CCR).[182] According to Weber and Hösli, the CCR is shaped by four factors: 1) international legal framework, 2) market forces, 3) broadened responsibility concepts and 4) litigation.[183] CCR manifests mainly in disclosure and due-diligence obligations.[184]

It is not surprising that fossil fuel corporations and scandals related to their activities were at the centre of promoting corporate responsibility.[185] For example, Shell issued the "Statement of General Business Principles" code of conduct in 1997, two years after the death of Saro-Wiwa.[186] Watts presents a critical analysis of CSR, which, in its voluntary form, is appealing to the companies[187] and is prone to greenwashing.[188] According to the OECD's survey, *"less than 10% of codes with independent external monitoring, 40% did not mention monitoring at all, and 60% had no penalties for noncompliance (80% had no implementation programs whatsoever)."*[189] Absurdity of certain CSR programmes is illustrated by Shell's effort to develop "sustainable community development" programmes in context of rising unrest in Niger Delta in late 90s and early 2000s.[190] Watts concludes that voluntary self-regulation proves itself insufficient in the case of fossil fuel corporations and calls for "multilateral mandatory agreements" on international and intergovernmental level[191] and *"creation of institutions and forms of governance in which well-defined mandatory human rights obligations can be made*

(Capstone Publishing Ltd 1997) p 69, available from https://www.sdg.services/uploads/9/9/2/1/9921626/cannibalswithforks.pdf accessed 26 September 2023.

[180] See UN PRI, 'What are the Principles for Responsible Investment?' (unpri.org) <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment> accessed 26 September 2023; see also: Weber and Hösli (n 178) p 86.

[181] Weber and Hösli (n 178) p 84.

[182] See [in Czech] Feigerlová (n 163) p 620.

[183] See chart in Weber and Hösli (n 178) p 88; International legal framework was described in *chapter 1.2*, broadened responsibility concepts are issue of this *Part* and in the next one, litigation is going to be the focus.

[184] See ibid pp 90.

[185] Watts (n 102) 394.

[186] Ibid.; Climate Files, '1997 Shell Statement of General Business Principles' (Climatefiles.com) <https://www.climatefiles.com/shell/1997-shell-statement-general-business-principles/> Accessed 26 September 2023.

[187] Watts (n 102) p 394.

[188] Ibid p 397.

[189] Ibid p 396 (citing OECD)

[190] See case study ibid pp 398.

[191] See ibid pp 397.

applicable to corporate oil activities,*"*[192] making effectively a case for "business and human rights."

In the domain of BHR, its relation to climate change needs further investigation,[193] although we can point at first papers forming connections between Business and Human Rights and emergence of "climate due diligence."[194]

3.2 International law: From proposing "New International Economic Order" to "authoritative" soft-law instruments

Regulation of corporate conduct is primarily the role of domestic law, as legal personality of corporations under international law is questionable[195] - corporations are not bound to international treaties nor international customary law.[196] However, the transboundary nature of corporate conduct and environmental harm (of which climate change is a model example) caused by corporate activities weakens the capacity of domestic regulation and arguably requires an international response.[197] Thus, I will start my examination in the sphere of international law.

3.2.1 The road to UNGPs

General responsibility of private entities in the realm of international environmental law was notably reflected in the Paragraph 7 of 1972 Stockholm Declaration[198] Preamble:[199] *"To achieve this environmental goal will demand the* ***acceptance of responsibility*** *by citizens and communities and by* ***enterprises*** *and institutions at every level,* ***all sharing equitably in common efforts****"* (highlighting mine). In the same year, resolution (ECOSOC, Resolution 1721 (LIII), 1972) of the UN's the Economic and Social Council (ECOSOC)[200] requested the

[192] Ibid p 401.
[193] See Deva (n 152) p 21.
[194] Most notably see Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'' *6*(1) Business and human rights journal 93 <http://dx.doi.org/10.1017/bhj.2020.25> accessed 26 September 2023.
[195] See e.g., monography Markos Karavias, *Corporate Obligations under International Law* (Oxford University Press 2013).
[196] See Markos Karavias, 'Corporate responsibility for environmental harm'*, Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) 63 <http://dx.doi.org/10.4337/9781786439710.00010> accessed 26 September 2023.
[197] See ibid pp 63-64.
[198] The Declaration of the 1972 United Nations Conference on the Human Environment.
[199] See Karavias (n 196) p 65.
[200] ECOSOC, 'The impact of multinational corporations on the development process and on international relations' E/RES/1721(LIII) (1972).

Secretary-General to appoint a group of experts to *"study the role of multinational corporations and their impact on the process of development, especially that of the developing States,"*[201] which resulted in already mentioned "Multinational Corporations in World Development" study.

Aim to regulate TNCs on an international level of the UN framework was part of a broader set of policies known under the umbrella term "New International Economic Order"[202] (NIEO) proposed by "developing" countries of the South in the 1970s. In the 1974 General Assembly's (UNGA) *Declaration on the Establishment of a New International Economic Order* (A/RES/3201(S-VI),[203] *"regulation and supervision of the activities of transnational corporations"* was listed among the NIEO's principles. In the same year, the UN Centre for Transnational Corporations (UNCTC)[204] was established, together with the UN Commission on Transnational Corporations.[205] The main result of establishing these bodies was drafting an ambitious Code of Conduct for Transnational Corporations[206] in the 1980s, which reflected even environmental aspects of harmful corporate conduct.[207] However, the Draft Code of Conduct for TNCs was never adopted and attempts to create binding regulation of TNCs on an international level failed at the beginning of 1990s, partly because of reluctance of the Western states and, of course, corporations. As Watts notes, *"Modern CSR was born during the 1992 Earth Summit in Rio as an explicit endorsement of voluntary approaches rather than mandatory regulation (the latter approach drawn up by the UN Center on TNCs was defeated by a voluntary program promoted by a coalition of influential companies and backed by the Group of Eight countries."*[208]

Under the supervision of the UN, the voluntary initiative promoting "sustainable business", the UN Global Compact, was launched in 2000. It was the first soft-law instrument, which was

[201] Ibid cited in Karavias (n 196) p 65.
[202] Ibid.; Watts (n 102), 393; See also: Ahmed Mahiou, 'DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER' (United Nations Audiovisual Library of International Law 2011) <https://legal.un.org/avl/ha/ga_3201/ga_3201.html> accessed 26 September 2023.
[203] UNGA, 'Declaration on the Establishment of a New International Economic Order' A/RES/3201(S-VI) (1 May 1974).
[204] See Union of International Associations, 'United Nations Centre on Transnational Corporations (UNCTC)' (uia.org) <https://uia.org/s/or/en/1100024712 > accessed 26 September 2023.
[205] See Union of International Associations, 'United Nations Commission on Transnational Corporations' (uia.org) <https://uia.org/s/or/en/1100059616> accessed 26 September 2023.
[206] ECOSOC, 'Code of Conduct on Transnational Corporations' E/RES/1987/57 (28 May 1987).
[207] Karavias (n 196) pp 65-66.
[208] Watts (n 102) p 394.

based on a human rights perspective[209] (see its Principle 1 and Principle 2).[210] In 1998, the UN Sub-Commission on Human Rights initiated drafting of the *"Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,"* with a goal to establish *"a legally binding global framework on corporate human rights responsibility."*[211]

After the failure of another attempt to create a binding treaty, John Ruggie was appointed in 2005 to the newly created position of the UN Secretary-General's Special Representative for Business and Human Rights.[212] As a result, the 2008 UN 'Protect, Respect, Remedy' Framework (PRR Framework) and its implementation, the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs), were developed and both presented to the UN Human Rights Council (HRC) as reports. Finally, the HRC has unanimously endorsed the UNGPs in its resolution,[213] while establishing the Working Group on Business and Human Rights.[214]

3.2.2 United Nations Guiding Principles on Business and Human Rights

In their content, UNGPs present a certain compromise. Elaborating on the system developed by the PRR Framework, the UNGPs consist of 31 Principles divided into three pillars: "*(1) The state duty to protect human rights, (2) The corporate responsibility to respect human rights and (3) Access to remedy for victims of business-related abuses."*[215] Wettstein offers a brief summary of what these pillars imply: *"companies have a responsibility to respect – that is, not to violate – human rights, which is rooted not in law, but in social expectations. States, on the other hand, have a duty to protect human rights, which directly derives from international human rights law. In addition, both states and businesses ought to help improve access to remedy for the victims of corporate human rights violations, within the limits of their respective responsibilities."*[216] Thus, the UNGPs lack both direct obligations of the corporations and explicit enforcement regime.[217]

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[209] See Wettstein (n 95) p 28.
[210] UN Global Compact, 'The Ten Principles of the UN Global Compact' (unglobalcompact.org) <https://unglobalcompact.org/what-is-gc/mission/principles> accessed 26 September 2023.
[211] See paraphrase in Wettstein (n 95) p 28.
[212] See ibid p 29.
[213] HRC, 'Human Rights and Transnational Corporations and Other Business Enterprises' A/HRC/RES/17/4. (6 July 2011) (hereinafter referred to as UNGPs)
[214] Baumann-Pauly and Nolan (n 162) p 43.
[215] HRC (n 149) para 9.
[216] Wettstein (n 95) p 29.
[217] See ibid.

The second pillar starts with the foundational principles (Principles 11-15 UNGPs). To sum up, corporations "should" respect human rights and avoid their infringement and address human rights impacts.[218] Human rights refer to internationally recognized human rights treaties.[219] The responsibility to respect is understood in Principle 13 UNGPs as to *"avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur"* and to *"seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."* Principle 13 UNGPs is of special importance, because of extension of the responsibility to the supply chain of the businesses.[220] Such responsibility applies *"to all enterprises regardless of their size, sector, operational context, ownership and structure."*[221]

Finally, to meet their responsibility, the UNGPs expects businesses to create policies and processes including a. *"a policy commitment to meet their responsibility to respect human rights"*, b. "*a human rights due diligence"* and c. *"processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute."*[222] They are further concretized in the operational principles section, whereby Principle 16 UNGPs focuses on the policy commitment and Principles 17-21 UNGPs are developing the "ongoing" human rights due diligence process (*"in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts"*[223])

The third pillar is opened by the foundational Principle 25 UNGPs: *"As part of their duty to protect against business-related human rights abuse, 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."* Apart from the state-based judicial mechanisms,[224] States as well as non-state stakeholders are expected to establish *"operational-level non-judicial grievance*

[218] Principle 11 UNGPs. Available (including the Commentary to the UNGPs) from OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' [ST/]HR/PUB/11/4 (2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 27 September 2023.
[219] Principle 12 UNGPs.
[220] Commentary on Principle 13 UNGPs.
[221] Principle 14 UNGPs.
[222] Principle 15 UNGPs.
[223] Principle 17 UNGPs.
[224] Principle 26 UNGPs.

mechanisms"[225] (Principles 27-31 UNGPs) whose effectiveness for victims has been so far met with skepsis.[226]

In general, implementation of the UNGPs fails with the weakness of judicial and non-judicial mechanisms presumed by the third pillar and non-binding, soft law character[227] of the framework. The "weakness" of UNGPs was anticipated by the civil society[228] and is criticised also in retrospect.[229] According to many NGOs, weak human rights protection in the "host" third world countries, "corporate veil" structures and inability to enforce the court decisions are among the main obstacles to enhancing corporate responsibility.[230]

On the other hand, the UNGPs have since then been considered a common reference point in business and human rights,[231] bringing a broad multi-stakeholder consensus,[232] with many institutions such as OECD, the European Union (EU), the Council of Europe, ILO and many businesses subscribing to their content.[233] More importantly, UNGPs can be considered a groundwork which enhanced further development of the BHR agenda on many levels. After the endorsement by HRC in 2011, we can trace further mobilisation of NGOs, civil society and social movements.[234] Efforts to create a legally binding treaty continue:[235] In 2014, the HRC resolution on *"Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights"* (A/HRC/RES/26/9)[236] initiated by Ecuador and other states of the South[237] established an

[225] Baumann-Pauly & Nolan (n 162) p 57.
[226] Ibid.
[227] Ibid p 59.
[228] See statement signed e.g. by Amnesty International or HRW, see 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 27 September 2023.
[229] European Coalition for Corporate Justice, 'Justice delayed: 10 years of UN Guiding Principles' (Corporatejustice.Org. Online 29 June 2021) <https://corporatejustice.org/news/justice-delayed-10-years-of-un-guiding-principles/> accessed 27 September 2023.
[230] See ibid.
[231] Baumann-Pauly & Nolan (n 162) p 52.
[232] Ibid p 51.
[233] Bijlmakers (n 155) p 4.
[234] Ana María Suárez Franco and Daniel Fyfe, 'Voluntary vs. Binding: Civil Society's Claim for a Binding Instrument', In J. *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) p 146.
[235] See for further discussion: Jernej Letnar Cernic and Nicolás Carrillo-Santarelli, *The future of business and human rights: theoretical and practical considerations for a UN treaty* (Intersentia 2018).
[236] HRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' A/HRC/RES/26/9 (14 July 2014); see further e.g.: Chiara Macchi, 'A Treaty on Business and Human Rights: Problems and Prospects', *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) pp 63-86.
[237] It is notable that all "developed" states (all members of the EU, for example) did not support the resolution, see ibid p 64.

intergovernmental group to draft the treaty. On a national level, number of National Action Plans (NAPs) on BHR is rising,[238] as well as binding regional or "due diligence" national legislations.[239] Some of these developments will be reflected in the next chapters.

3.2.3 OECD Guidelines

Outside the UN, OECD's Guidelines for Multinational Enterprises (OECD Guidelines), voluntary standards agreed by national governments in 1976, are worth mentioning. Their environment chapter takes into account principles set in the Rio Declaration and Agenda 21, as well as Aarhus Convention.[240] Similar to UNGPs, they do not ground liability for environmental harm[241] or human rights violations. For a long time, OECD Guidelines lacked any human rights provisions at all. This changed in one of the frequent revisions, as OECD Guidelines literally translated Pillar II of the UNGPs.[242] Unlike UNGPs, there is, however, a way to address harmful corporate conduct via the "non-judicial grievance mechanism"[243] of National Contact Points (NCPs). Governments adhering to the OECD Guidelines are obliged to establish NCP in their jurisdiction.[244] NCPs essentially *"mediate the dispute and issue a final statement on whether and how it was resolved."*[245] Environmental consequences for corporate conduct are being dealt with by the NCPs, including first climate cases,[246] however, their effectiveness is varied.[247]

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[238] See overview of the recent development: OHCHR, 'National action plans on business and human rights' (Ohchr.org) <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights> accessed online 27 September 2023.
[239] See overview in Wettsetin (n 95) pp 30; see also: Ruggie (n 60) pp 80.
[240] Cited in Perry-Kessaris (n 145) p 369.
[241] See ibid. p 370.
[242] Ruggie (n 60) p 80.
[243] OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity' (Oecd.org 2021) p 3 <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.htm>
[244] Ibid p 3
[245] Ruggie (n 60) p 80.
[246] See e.g. *Germanwatch v VW* (OECD Guidelines Complaint) NCP Germany November 2007 available from <http://climatecasechart.com/non-us-case/germanwatch-vs-volkswagen/> accessed 27 September 2023; *Rete Legalità per il Clima (Legality for Climate Network) and others v ENI* (OECD Guidelines Complaint) NCP Italy 2022 available from <http://climatecasechart.com/non-us-case/rete-legalita-per-il-clima-legality-for-climate-network-and-others-v-eni/> accessed 27 September 2023; see also not accepted case: *Global Witness v UK Export Finance* (OECD Guidelines Complaint) UK NCP 16 March 2020, available from <http://mneguidelines.oecd.org/database/instances/uk0056.htm > accessed 27 September 2023.
[247] Perry-Kessaris (n 145) p 370.

3.3 Mandatory human rights due diligence: Norm cascading[248] into regional and national legislation

As shown above, substantial development of the BHR agenda is observed on regional (notably EU) and national level. This can take many forms. First step could be adopting a national action plan on BHR (NAP), which is becoming increasingly popular.[249] As of July 2023, there are around 30 (mostly European) states[250] worldwide with a NAP adopted. Their potential is, however, limited and adoption of NAP usually merely shows a government commitment for future improvement of the BHR agenda.[251] For example, in the Czech Republic, NAP (*Národní akční plán pro byznys a lidská práva, 2017-2022*) was adopted by the Czech government in 2017.[252] While concluding, that *"plan's approval should be an important factor triggering further debate,"*[253] the Czech NAP was not preceded by the analysis of the current state and did not outline possible substantive legislative development. Regarding the Pillar II UNGP, the NAP is rather vague and based on mere recommendation to businesses. Of most importance is the recommendation to *"consider introducing an internal due diligence mechanism to spot and eliminate human rights risks."*[254]

Impact of NAPs, in general, is limited to identification of governance gaps and proposing actions for public administration to undertake.[255] Adopting NAP should not be a substitute to

[248] Term used by Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organization 887, <http://dx.doi.org/10.1162/002081898550789> accessed 28 September 2023.
[249] HRC, 'Guiding Principles on Business and Human Rights at 10: taking stock of the first decade Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' A/HRC/47/39 (2021) para 41.
[250] For details see Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights. Online: Countries (Globalnaps.org) <https://globalnaps.org/country/> accessed 28 September 2023.
[251] See David W. Rivkin, Samantha J. Rowe, Deborah Enix-Ross and others 'UN Guiding Principles on Business and Human Rights at 10' (Debevoise & Plimpton LLP, 6 July 2021) para 22 <https://www.debevoise.com/insights/publications/2021/07/un-guiding-principles> accessed 28 September 2023.
[252] 'National Action Plan on Business and Human Rights 2017-2022.' English translation available from: <https://www.narodniportal.cz/narodni-akcni-plan-pro-byznys-a-lidska-prava-na-obdobi-2017-2022/> accessed 28 September 2023.
[253] Ibid p 54.
[254] Ibid p 35.
[255] Humberto Cantú Rivera, 'National Action Plans on Business and Human Rights: Progress or Mirage?' (2019) 4(02) Business and Human Rights Journal 213, 236 <http://dx.doi.org/10.1017/bhj.2018.33> accessed 28 September 2023.

legislation, rather, it is rather a first step to more ambitious regulation.[256] That is why many NGOs speak for adoption of mandatory[257] human rights due diligence.[258]

Human rights due diligence (HRDD) is at core of the Pillar II of the UNGPs (Principles 15, 17-21 UNGPs) and was adopted by the OECD as well.[259]

In general, HRDD is defined in Principle 15 (b) UNGPs: *"In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:* [...] *(b) human rights due diligence process to identify, prevent, mitigate;* [...]*"*

Principle 17 UNGPs develops further on the matter:

"In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."

Additionally, Principles 18-21 UNGPs elaborate essential components of the HRDD. HRDD should be distinguished from 'business due diligence,' which aims at managing *"business*

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[256] See ibid.

[257] See OHCHR, 'Mandatory human rights due diligence (mHRDD)' (Ohchr.org) <https://www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd> accessed 28 September 2023.

[258] See e.g.: European Coalition for Corporate Justice, 'EU model legislation on corporate responsibility to respect human rights and the environment' (Corporatejustice.org, Legal Brief, 26 February 2020) <https://corporatejustice.org/publications/eu-model-legislation-on-corporate-responsibility-to-respect-human-rights-and-the-environment/> accessed 28 September 2023.

[259] See OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (Oecd.org 2018) <https://www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm> accessed 28 September 2023.

risks, where the risk is to the business alone," while HRDD focuses on impacts of corporate conduct on the "right-holders"[260] - individual, group or possibly even the environment. Due diligence is also, together with disclosure obligations, a key component of emerging Corporate Climate Responsibility.[261]

HRDD based upon UNGPs and other international law instruments is, however, still in the realm of a mere social expectation-based *responsibility*. Thus, mandatory HRDD enshrined in regional and national legislation is a potential "game-changer." One of the factors which sped up the discussion about "hardening" due diligence in certain jurisdictions was the Rana Plaza tragedy in Bangladesh in 2013.[262]

3.3.1 European Union - climate due diligence in the making?

On a regional level, the EU is a clear leader in the HRDD field, being the only regional organisation with specific legislation (Directives and Regulations) on HRDD.[263] Considering the disclosure component of corporate responsibility, the 2014 Non-Financial Reporting Directive[264] is worth mentioning. First two mandatory HRDD Regulations, the EU Timber Regulation 2010[265] and the EU Conflict Minerals Regulation 2017[266] focus on particular products and their importers.

The far-reaching Directive on Corporate Sustainability Due Diligence (CSDDD) is currently in the spotlight of the business and human rights advocates. Draft of the CSDDD was released in February 2022 by the EC, preceded by the 2020 EC's *Study on due diligence requirements through the supply chain*[267] and European Parliament's 2021 *Resolution with recommendations*

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[260] Robert McCorquodale, 'Human rights due diligence instruments: evaluating the current legislative landscape', *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing 2022) pp 122-123 <https://doi-org.ezproxy.is.cuni.cz/10.4337/9781788979832.00013> accessed 28 September 2023.
[261] Weber and Hösli (n 178) p 90.
[262] In French context, see Schilling-Vacaflor (n 127) p 115.
[263] Ibid p 131.
[264] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014) OJ L 330/1.
[265] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance (2020) OJ L 295/23.
[266] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (2017) OJ 130/1.
[267] European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H. and others, 'Study on due diligence requirements through the supply chain – Final report' (European Commission, 2020) <https://data.europa.eu/doi/10.2838/39830> accessed 28 September 2023.

to the Commission on corporate due diligence and corporate accountability.[268] Climate change seems central to the draft, as EC cites climate neutrality and green economy goals of the European Green Deal among the main objectives.[269] This directive is necessary, as *"voluntary action does not appear to have resulted in large scale improvement across sectors and, as a consequence, negative externalities from EU production and consumption are being observed both inside and outside the Union. Adverse impacts include, in particular, human rights issues such as forced labour, child labour, inadequate workplace health and safety, exploitation of workers, and environmental impacts such as greenhouse gas emissions, pollution, or biodiversity loss and ecosystem degradation."*[270]

It is evident, that unlike some other HRDD instruments, scope of the Draft CSDDD is broad and reaches far beyond human rights violations, as it includes adverse environmental impacts on their own. CSDDD should lay down rules *"(1) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and (2) on liability for violations of the obligations mentioned above."* (Art. 1 Draft CSDDD). These apply for both the largest companies based in EU Member States as well as those listed in the third countries who operate within the EU (Art. 2 Draft CSDDD).

Scope of both adverse human rights and adverse environmental impacts is limited in the Annex of the Draft CSDDD. Environmental impacts are limited to listed *"violations of internationally recognized objectives and prohibitions included in environmental conventions."* (Annex, Part II Draft CSDDD). The Paris Agreement or any other convention related to climate change is not included in the EC's Proposal. Annex, Part 1 Draft CSDDD enlists 20 specific *"violations of rights and prohibitions included in international human rights agreements,"* which include environmental rights specified in Point 18:

"18. Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that

[268] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)); see also: Business & Human rights Resource Centre, 'Briefing by BIICL: The new European Directive on Corporate Sustainability Due Diligence' (Business-humanrights.com) <https://www.business-humanrights.org/en/latest-news/briefing-the-new-european-directive-on-corporate-sustainability-due-diligence/> accessed 28 September 2023.
[269] European Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM/2022/71 final. ("Draft CSDDD")
[270] Ibid.

(a)impairs the natural bases for the preservation and production of food or

(b)denies a person access to safe and clean drinking water or

(c)makes it difficult for a person to access sanitary facilities or destroys them or

(d)harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or

(e)affects ecological integrity, such as deforestation,

in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights."

Special obligation concerning combating climate change is enshrined in Art. 15 Draft CSDDD. The largest corporations *"shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations."* (Art. 15 (1) Draft CSDDD). Furthermore, *"member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes emission reduction objectives in its plan."* (Art. 15 (2) Draft CSDDD).

What is important, enforcement of the CSDDD's objectives shall be secured by both supervisory authorities provided by member states (Art. 17 Draft CSDDD) and civil liability (Art. 22 Draft CSDDD).

On 1 June 2023, the European Parliament (EP) voted in favour of the CSDDD.[271] EP has amended[272] the Draft to strengthen it in direction of more robust environmental and climate protection. Climate change was added to the list of environmental impacts considered,[273] together with a reference obligation to achieve GHG emissions reduction in line with goals of the Paris Agreement under the UNFCCC, European Climate Law and the Global Methane

[271] See press release of European Parliament: EP, 'MEPs push companies to mitigate their negative social and environmental impact' (EP Press Release, 1 June 2023) <https://www.europarl.europa.eu/news/en/press-room/20230524IPR91907/meps-push-companies-to-mitigate-their-negative-social-and-environmental-impact> accessed 28 September 2023.

[272] See EP, 'Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))(2)' (1 June 2023) <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html> accessed 28 September 2023.

[273] See ibid amendment 366.

Pledge.[274] Procedural environmental rights (access to information, public participation in decision making and access to justice in environmental matters according to the Aarhus Convention), as well as the protection of environmental human rights defenders were strengthened by their inclusion to the list.[275] The EP's version of the proposal has been praised by the NGOs,[276] e.g. for improving access to justice but was not spared of criticism.[277] Joint statement of environmental and corporate justice NGOs highlighted insufficiency of definition of adverse environmental impacts by fragmented environmental conventions only and warned of not including climate in general environmental due diligence.[278] According to Christopher Patz of the European Coalition for Corporate Justice, CSDDD is to its date the most ambitious mandatory HRDD legislation (compared to its predecessors in national jurisdictions, see below).[279] Still, he points out at reduced scope of the value chain,[280] not considering *ability to influence* when addressing adverse impacts[281] and insufficiently proactive stakeholder consultation.[282]

The final version[283] of the CSDDD remains unclear, and more intensive negotiations are expected in September 2023.[284]

[274] See ibid, amendment 377.
[275] See ibid, amendments 379-380.
[276] See e.g. Amnesty International, 'EU: European Parliament's vote for new corporate due diligence legislation should strengthen human rights' (Amnesty.org 1 June 2023) <https://www.amnesty.org/en/latest/news/2023/06/eu-european-parliaments-vote-for-new-corporate-due-diligence-legislation-should-strengthen-human-rights/> accessed 28 September 2023.
[277] See e.g. European Coalition for Corporate Justice, 'EU Parliament gives green light to corporate due diligence law, but still leaves grave loopholes' (*ECCJ*, 31 May2023) <https://corporatejustice.org/news/eu-parliament-gives-green-light-to-corporate-due-diligence-law-but-still-leaves-grave-loopholes/> accessed 18 September 2023; Business & Human Rights Resource Centre, 'Effective Environmental and Climate Protection in the CSDDD: Challenges and Priorities' (Joint Briefing, 2023) <https://media.business-humanrights.org/media/documents/EN_-_Briefing_on_Environment_and_Climate_in_CSDDD.pdf> accessed 28 September 2023.
[278] See ibid.
[279] Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) *7*(2) Business and Human Rights Journal 291, 291 <http://dx.doi.org/10.1017/bhj.2022.19> accessed 28 September 2023.
[280] Ibid p 292.
[281] Ibid p 294.
[282] Ibid.
[283] The Council of the EU has issued its statement in November 2022: Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on the Duty of Business Diligence for Sustainability and amending Directive (EU) 2019/1937 – General Approach' No 15024/1/22 REV1 (30 November 2022) <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf> accessed 28 September 2023.
[284] Silvia Ellena, 'Negotiations on EU due diligence rules expected to pick up speed in September' (Euractiv.com, 12 July 2023) <https://www.euractiv.com/section/economy-jobs/news/negotiations-on-eu-due-diligence-rules-expected-to-pick-up-speed-in-september/> accessed 28 September 2023.

3.3.2 National legislations

The base for the European directive were developments on the level of individual nation states. European states are particularly active in the field. In 2017, the French Duty of Vigilance Act[285] (*loi de vigilance*; French Vigilance Act) was adopted, followed by The Netherlands Child Labour Due Diligence Act 2019[286], the German Corporate Due Diligence in Supply Chains Act 2021 (*Lieferkettensorgfaltspflichtengesetz*; "LkSG", in force since 1 January 2023)[287] and the Norwegian Transparency Act 2021 (in force since 1 July 2022).[288] Additionally, there are other proposals in Austria, Belgium and the Netherlands and government commitments in Finland, Luxembourg and Spain.[289] These acts and proposals differ in their scope,[290] due diligence and reporting obligations themselves and in terms of liability, access to justice and public enforcement.[291] All of these categories are relevant to the potential climate litigation.

In this subchapter, I focus on the French and German legislation.

French Vigilance Act was the first comprehensive mandatory human rights and environmental due diligence law[292] and its original proposal submitted to the presidency of the National Assembly was even more ambitious, as it targeted all France-based companies (while the final text obliges only companies above a certain threshold of employees) and introduced a reversed burden of proof from victims to companies.[293] After entry of the French Vigilance Act in force,

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[285] Law No. 2017-399, Duty of Vigilance of Parent and Instructing Companies, *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.
[286] Child Labor Duty of Care Act of 24 October 2019, *Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid)*.
[287] Act on Corporate Due Diligence in Supply Chains of 16 July 2021, *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz - LkSG), "Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021 (BGBl. I S. 2959)"*.
[288] Transparency Act 2021, LOV-2021-06-18-99, *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)*.
[289] See map in ECCJ, 'Map: Corporate accountability legislative progress in Europe' (ECCJ 25 January 2023) <https://corporatejustice.org/publications/map-corporate-accountability-legislative-progress-in-europe/> accessed 28 September 2023; and comparative table in ECCJ, 'Comparative table: Corporate due diligence laws and legislative proposals in Europe' (ECCJ 21 March 2021) <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/> accessed 28 September 2023.
[290] That means, which companies are obliged, which adverse impacts are addressed (human rights, labour rights, environment, climate) and the scope of the value chain (own operations, subsidiaries, suppliers, all business relationships).
[291] See overview in comparative table: ECCJ, 'Comparative table: Corporate due diligence laws and legislative proposals in Europe' (ECCJ 21 March 2021) <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/> accessed 28 September 2023.
[292] Schilling-Vacaflor (n 127) p 115.
[293] See ibid p 116.

the enforcement and "vigilance plans" submitted by the companies were assessed as weak,[294] as illustrated by the case of French carbon major Total. Total's vigilance plan is very general without mentioning its subsidiaries and places of production, relying mainly on mere *"internal mechanisms mainly build on selfassessment and auditing."*[295] Two climate cases against Total based on the French Vigilance Act will be assessed in *chapter 4.3*.

To sum up, strength of the French Vigilance Act lies in encompassing both human rights and environmental impacts (in a broad manner), challenging the so-called "separation principle" (and thus strengthening the accountability of the mother company towards its subsidiaries and controlled companies) and establishing the basis for legal liability.[296] Civil liability is possible after the company breaches its own vigilance obligations.[297]

Compared to the French legal framework, German LkSG falls short on several crucial points, Firstly, its environmental scope is much narrower,[298] covering only violations of prohibition in three international conventions,[299] thus leaving the climate-law violations excluded. Second, remedial measures in due diligence itself are vague with low stakeholder participation. Third, coverage of the supply chain is narrow, as due diligence obligations only apply to the *"company's own activities and its direct suppliers,"* which is counter to the international standard of UNGPs.[300] Maybe most importantly, the LkSG provides no specific provision on civil liability,[301] which is even explicitly excluded[302] - monitoring, enforcement and sanctions are placed within existing administrative agencies.[303] In light of these shortcomings, LkSG will hardly provide ground for corporate climate litigation in Germany.

3.3.3 Preliminary conclusion

Mandatory HRDD legislation is one of the examples of "hardening" corporate accountability,[304] helping to move from mere corporate (social) responsibility to corporate

[294] See ibid pp 116-117; see also McCorquodale (n 260) p 134.
[295] Schilling-Vacaflor (n 127) p 117.
[296] Ibid p 123.
[297] Cited in McCorquodale (n 260) p 134.
[298] Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) Business and human rights journal *6*(3) 550, 554 <http://dx.doi.org/10.1017/bhj.2021.43> accessed 28 September 2023.
[299] Namely Minamata Convention on Mercury 2013, the Stockholm Convention on Persistent Organic Pollutants 2001 or the Basel Convention on Hazardous Wastes 1989.
[300] Krajewski, Tonstad and Wohltmann (n 298) p 556.
[301] Ibid pp 552-3.
[302] Ibid p 558.
[303] Ibid p 557.
[304] Schilling-Vacaflor (n 127) pp 111.

liability. In connection to the international standards, we can similarly speak of "hardening" of soft law[305], or "norm cascading."[306] It was shown how international soft law enhances binding legislation on regional or national level. One of the positive outcomes of effective mandatory HRDD law is strengthening access to justice of Global South victims, which live in states with poor rule of law: "*Due diligence regulations from home state countries could be of particular relevance for such cases where host state countries do not live up to their obligations to enforce the human rights duties of TNCs in their jurisdictions."*[307]

While NGOs and civil society in general push for strong mandatory HRDD legislation, human rights/environmental due diligence is being often criticised by scholars[308] - e.g. for its ambiguous language[309], incapability of companies to change their mindset from standard due diligence towards HRDD (that is, from monitoring risks to the company to monitoring risks arising from the corporate conduct)[310] and even misuse of "human rights" terminology, which can help to obfuscate the gap between rhetoric and practice.[311] In the most pessimistic perspective, mandatory HRDD laws are described by Quijano and Lopez as *"hollow laws which do little to change the status quo or, even worse, inadvertently provide a tool to further impunity for business-related human rights abuses"*[312] Superficial "tick-box" due diligence approaches could worsen the situation of victims, not improving it.[313] Moreover, corporations might be motivated to avoid conducting proper due diligence (which could potentially address adverse impacts of corporate conduct), as it could be used against the company as evidence of its knowledge or intent in civil (tort) law or criminal cases.[314] Finally, the political reality of (supra)national jurisdictions affects the wording of national laws, which might not be consistent with UNGPs or OECD Guidelines.

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[305] Weber and Hösli (n 178) p 87.
[306] Finnemore and Sikkink (n 248).
[307] Schilling-Vacaflor (n 127) p 120.
[308] See e.g. Marianna Leite, 'Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models' (2023) *8*(2) Business and Human Rights Journal 197-212 <http://dx.doi.org/10.1017/bhj.2023.11> accessed 28 September 2023; Mark B Taylor, 'Human rights due diligence in theory and practice' *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) <http://dx.doi.org/10.4337/9781786436405.00011> accessed 28 September 2023; Gabriela Quijano and Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) *6*(2) Business and Human Rights Journal 241 <http://dx.doi.org/10.1017/bhj.2021.7> accessed 28 September 2023.
[309] Leite (n 308) p 8
[310] See Taylor (n 308) pp 103.
[311] Cited in Leite (n 308) p 202.
[312] Cited in Leite, M. (n 308) p 204.
[313] Quijano and Lopez (n 308) p 251.
[314] See Taylor (n 308) p 106.

In general, the mandatory HRDD acts vary in many aspects, which was illustrated by discussing advantages and drawbacks of existing French and German legislation, as well as the European proposal. The most important aspect for this thesis is inclusion of environmental harm in relation to climate change. Some laws (like Norway Transparency Act) are lacking specific environmental due diligence. In these cases, *"environmental damages are covered insofar as they adversely impact human rights,"*[315] which opens the above-discussed question of "human rights greening" again. On the other hand, environmental due diligence can be effective even without connection to human rights per se (while another issue of liability in case of mere environmental harm without human right aspect, might arise). Emergence of the sole climate due diligence is an open question, although both European Draft CSDDD and French Vigilance Act provide a potential for more solid corporate climate responsibility.

From this subchapter, it is clear that human rights obligations for corporations are in most jurisdictions still a matter of international soft law or human rights/environmental due diligence law of dubious quality, which hinders efforts to make carbon majors and other companies accountable for their share of GHG emissions. In the last chapter of this Part, I will focus on liability from a wider perspective.

3.4 False dichotomies? Between international and domestic law, public and private law, hard law and soft law

In the chapters above, I was dealing with human rights obligations of corporations based solely on *corporate social responsibility* or *business and human rights* discourses, that is with their international sources and how they are reflected in (supra)national jurisdictions. Of course, this is just part of the bigger picture. It is far beyond scope of this thesis to provide an exhaustive overview of existing and potential basis for corporate litigation across various jurisdictions. However, few points shall be made for clarification and as a background for *Part 4*.

From an international law viewpoint, Karavias distinguishes three areas of corporate responsibility for environmental harm: 1) domestic law, 2) international law and 3) "private" law.[316] By "private law", Karavias refers, quite misleadingly, to "private legal orders"[317] represented by corporate codes of conduct,[318] which is not to be confused with "private law"

[315]Krajewski, Tonstad and Wohltmann (n 298) p 554.
[316] Karavias (n 196) p 63 (quotation marks mine).
[317] Ibid.
[318] Ibid p 68.

as a part of national legal order. Each domain has its setbacks in context of transnational environmental harm: *"Domestic law is seen as 'too territorial', international law as 'too soft' and private law as 'too voluntary.'"*[319]

For the purpose of this thesis, I find it better suited to distinguish between 1) international (public) law, 2) domestic public law and 3) domestic private law.

International law of corporate responsibility (and its connection to human rights) was already discussed in the chapters above. As a ground for potential climate litigation, the relationship of national legal order with international law and implementation of instruments stemming from international law into domestic legislation are both crucial.

On a domestic level, human rights are justiciable via national constitutional/human rights law (which is usually superior to the statutory law), which is in domain of the public law. Traditionally, subjects of human rights are on one side, the individual (natural/legal) person as a "beneficiary" and, on the other, the state as the "addressee" (duty-bearer).[320] This vertical relationship between subjects is since WW2 relativized by the "horizontal effect" jurisprudence, that is, applying human rights to the relationship between two private parties. This has various implications. Three approaches can be distinguished, indirect effect (*mittelbare Drittwirkung*) in horizontal relationships developed by German jurisprudence in the *Lüth case*[321] (which was accepted by the Czech Constitutional Court),[322] positive state-obligation established by the ECtHR jurisprudence and finally, anglo-american "state action doctrine."[323] Implications of horizontal effect human rights approaches for potential corporate climate litigation were not yet, as far as I know, examined.[324] In both "indirect-effect" and "positive state-obligation" doctrines, however, the state remains the duty-bearer of human rights obligations. Hence, what can be described as "constitutionalization of private law"[325] does not provide ground for climate litigation against private entities.

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[319] Ibid p 70.
[320] See [in Czech] Michal Bartoň, Jan Kratochvíl, Martin Kopa and others, *Základní práva* (Leges 2016).
[321] *Lüth*, Judgement of BVerfG of 15 January 1958, BVerfGE 7, 198.
[322] See e.g. Judgement of Czech Constitutional Court of 21 October 2008, IV.ÚS 1735/07.
[323] See overview in Martin Bobák, 'The Horizontal Effect of the Right to a Healthy Environment' (Diploma Thesis, Faculty of Law of Masaryk University 2012), p 16.
[324] Good summary of the horizontal effect in the context of environmental rights is however presented by the Bobák's thesis, see ibid.
[325] See Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) German Law Journal 341 <http://dx.doi.org/10.1017/s2071832200004727> accessed 28 September 2023.

Lack of direct effect of human rights in most jurisdictions makes the case for binding mandatory HRDD statutory laws. Company's not acting in line with human rights due diligence obligations can be addressed via criminal prosecution, civil liability, or administrative penalties.[326] Moreover, HRDD may be, e.g., a condition for regulatory approval or requirement for doing business with the government.[327]

Domestic private law (tort law) is, thus, perhaps the most viable approach to address environmental harm conducted by TNCs, which is already demonstrated by human rights litigations in many jurisdictions.[328] Examples of such *"extraterritorialisation of responsibility on the basis of domestic tort law"*[329] (as put by Karavias) are US *Kiobel v Royal Dutch Petroleum Co*,[330] under the Alien Tort Claims Act (ATCA) in the USA, *Lungowe and others v Vedanta Resources Plc*[331] and *Okpabi v Shell*[332] in the UK and cases against Shell in the Netherlands (e.g. Oguru *et al v Royal Dutch Shell and SPDC*).[333] Of course, tort law will vary across jurisdictions depending on eagerness to accept jurisdiction of these extraterritorial cases, type of liability (negligence vs strict liability)[334] or openness of the tort law to accept human rights arguments.

In the European context, cross-border litigation is regulated by the EU Brussels I regulation (1215/2012/EU)[335] and the Lugano Convention (2007)[336] between EU and Norway, Iceland, and Switzerland. These provide "forum shopping" options for potential plaintiffs to choose a "climate-friendly" forum.[337] Determining the applicable law, then, is governed by the Rome II

[326] See Olivier De Schutter, Anita Ramasastry, Mark B. Taylor and others, 'Human Rights Due Diligence: The Role of States' (2012). <https://en.frankbold.org/sites/default/files/publikace/human_rights_due_diligence-the_role_of_states.pdf> accessed 28 September 2023.
[327] See ibid.
[328] See Karavias (n 196) pp 70.
[329] See ibid p 63.
[330] *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).
[331] *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20.
[332] *Okpabi and others v Royal Dutch Shell Plc and another*, [2021] UKSC 3.
[333] *Gerechtshof den Haag* (Haag Court of Appeals) of 29 January 2021, 200.126.804/01 200.126.834/01, ECLI:NL:GHDHA:2021:132
[334] See Louise Angélique de la Fayette 'International liability for damage to the environment', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010) pp 325-326.
[335] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351/1
[336] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339/3.
[337] See Martin Spitzer and Bernhard Burtscher, 'Liability for Climate Change: Cases, Challenges and Concepts' (2017) *2017*(2) Journal of European Tort Law 137, 151<http://dx.doi.org/10.1515/jetl-2017-0009> accessed 29 September 2023.

regulation,[338] which is, in principle, the law of the country where damage occurred (*lex loci damni*).[339]

The 2017 article of Spitzer and Burtscher concludes with proclamation, that climate change litigation against corporations *"died where it was born,"* especially in the US, while in Europe, *"prospect for* [its] *success* [...] *seems limited"* as *"*[c]*ourts would have to stretch, probably overstretch, the regular standards of imposing liability."*[340] Whether is such sceptical claim justified will be examined in *Part 4*.

Brief overview of possibilities for plaintiffs and navigating between international/domestic, public/private and hard/soft law dichotomies may leave one confused. Hence, legal scholars criticise this "either-or" dualism as anachronistic. *Reflexive law* developed in the 1980s by German legal scholar Gunther Teubner proposes a *"more procedurally-oriented approach that avoids the regulate/deregulate, mandatory/voluntary, and hard/soft law dichotomies."*[341] Similarly, *transnational law*[342] discourse offers a critical perspective of traditional legal categories, even in context of climate law. For example, the framework under the Paris Agreement represents, according to Affolder, *"an intense intermingling of the public/private, state/nonstate, hard law/soft law developments that currently dominate climate regulation."*[343] Finally, Weber and Hösli, in their assessment of the emergence of the CCR clearly express that the *"traditional dichotomy between hard law and soft law must be overcome."*[344] It is beyond scope of this thesis to analyse these concepts further.

Rather than with answers, I will finish this Part with questions for the following case-law analysis. Can international soft law establish or strengthen accountability of carbon majors? Is legislation via mandatory human rights due diligence a promising way to hold carbon majors accountable? Can private law deal with the novelty and complexity of climate litigation? Are doubts[345] expressed by Spitzer and Burtscher in 2017 still valid?

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[338] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199/40.
[339] Ibid pp 153.
[340] Ibid p 176.
[341] Ruggie (n 60) p 77, pp 80.
[342] See e.g. Peer Zumbansen, *The Oxford handbook of transnational law* (Oxford University Press 2021).
[343] Natasha Affolder 'Transnational Climate Law', *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) 251 <https://doi.org/10.1093/oxfordhb/9780197547410.013.11> accessed 22 July 2023.
[344] Weber and Hösli (n 178) p 87.
[345] Spitzer and Burtscher (n 337) p 176.

4. Corporate climate litigation[346]

Establishing corporate responsibility of TNCs in light of human rights abuses caused by the changing climate illustrates two recent trends[347] in the sphere of climate change litigation. First of all, cases brought on human rights grounds are rising in number and importance.[348] Secondly, non-state private actors become more often targeted by the climate litigants. Companies were among the first defendants targeted by the early climate change mitigation efforts. Richard Heede's study in 2014 on carbon majors[349] (already mentioned in *chapter 1.1*) inspired a "second wave" of corporate climate litigation.[350] In the initial chapter of this Part, I will discuss the definition of climate change litigation and provide potential categorisation, which will help to explain structure and selected case-law which will follow.

4.1 Definition and typology - framing climate change litigation against corporations

Setzer and Higham operate with quite a narrow definition of climate [change] litigation (CCL). Climate litigation consists of *"cases before judicial and quasi-judicial bodies (*[e.g.] *arbitral tribunals, national human rights institutions, consumer watchdogs, and OECD National Contact Points* [...]*) that involve material issues of climate change science, policy, or law."*[351] Cases listed in Climate Change Litigation Databases[352] of Sabin Center for Climate Change Law are in line with the same definition. This definition is similar to the generally accepted[353] definition of Markell and Ruhl - CCL can be *"any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and*

[346] In this work "corporate climate litigation" is understood as a (strategic) climate litigation *against* corporations.
[347] Setzer and Higham 2021 (n 11).
[348] Peel and Osofsky (n 18).
[349] Heede 2014 (n 36).
[350] Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2023 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, 2023) p 35 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf> accessed 29 September 2023.
[351] Ibid p 8.
[352] Climate Case Chart (Sabin Centre for Climate Change Law) <http://climatecasechart.com/> accessed 29 September 2023.
[353] Eva Balounová, 'Klimatická litigace', *Klimatické právo* (Wolters Kluwer 2022) p 591.

expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts."[354]

For their empirical assessment, Markell and Ruhl identified ten broad categories,[355] which can help us to classify the growing body of CCL and illuminate which cases are to be considered in this work. To me, relevant are these categories*: "1) the type of plaintiff, 2) the type of defendant, 3) the type of tribunal, 4) the type of claim being brought, 5) the statutes and other legal sources supporting the claims, 6) the general objective of the litigation, 7) the status and outcome of the case."*[356]

As for 2), this thesis focuses only on the lawsuits against private actors. Although the most well-known and historically the most numerous are the lawsuits against states and governments (so-called *Urgenda*-style cases),[357] the number of lawsuits against private entities is rising: Between 1 June 2022 and 31 May 2023, over 40 % of cases studied were targeted at corporations or trade bodies.[358]

Among CCL, the most prominent are the strategic litigations. According to Setzer and Higham, key components to strategic climate litigation are: **1) identity of the plaintiff** (they are *"selected to communicate a carefully designed message"*, being typically filed by an NGO, individual party or a politician) **2) identity of the defendant** (largest GHG emitter – government or a corporation), **3) aim of the litigation** (which extends the situation of the litigant, aiming at having a broader *"policy and regulatory impacts"* and **4) if the case is one piece of a larger puzzle** (being part of a *"broader advocacy strategy"* including media coverage and communication strategy).[359] Between 2015-2022, the majority (80 %) of CCL against corporations can be classed as "strategic" (or at least "semi-strategic").[360] Most cases discussed in the Part can be categorised as (semi)strategic.

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[354] David L Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' [2011] SSRN Electronic Journal 15 <http://dx.doi.org/10.2139/ssrn.1762886> accessed 29 September 2023.Markell, D., & Ruhl, J. B. (2012).

[355] Ibid 28.

[356] Ibid p 28 (numbering changed) Complete list is as such: *"1) the type of plaintiff, 2) the type of defendant, 3) the type of tribunal, 4) the year of filing and of most recent tribunal action, 5) the type of claim being brought, 6) the general objective of the litigation, 7) the statutes and other legal sources supporting the claims, 8) the jurisdictional mechanism the plaintiffs used to bring the action, 9) the status and outcome of the case, and 10) the contribution any tribunal decision made to developments in the law."*; see similar typology in Balounová (n 353) pp 593.

[357] See Setzer and Higham 2023 (n 350).

[358] See ibid p 19.

[359] See ibid pp 19-20.

[360] Ibid p 21. According to Setzer and Higham, semi-strategic are the cases where not all four criteria outlined are fulfilled.

Cases against private parties - parties - or "horizontal climate lawsuits"[361] - are becoming increasingly diverse. Regarding the sector type - I focus on carbon majors, that is mainly companies involved in fossil fuel exploration, production and transportation. Besides fossil fuel corporations, automobile industry, cement industry and energy production using fossil fuels will be considered.

As to the type of claim and the general objective, the landscape is similarly diverse.[362] Two main lines of argument can be highlighted, that is (in terminology of Setzer and Higham) *'retrospective' polluter-pays cases* (model example: *Lliluya v. RWE*, see *subchapter 4.4.1*) and *'prospective' corporate framework cases* (model example: *Milieudefensie v Shell*, or simply *Shell case*).[363] While the former approach aims at financial damages based on historical contribution of the company, the latter one attempts to establish a GHG emission reduction-obligation. In the *Shell*-style cases, the plaintiffs typically seek *"court orders requiring companies to align their current and future activities with the goals of the Paris Agreement and to comply with their human rights obligations."*[364] Another group of cases is based on obligations arising from corporate and financial law for the company or its executives[365] (e.g. against company executives via so called shareholder activism, see e.g. *ClientEarth v Shell Board of Directors*).[366] Final group of cases consist of greenwashing ("climate-washing")[367] litigation (e.g. *Australasian Centre for Corporate Responsibility v Santos*).[368]

Main focus of this thesis are the Shell-style 'prospective' corporate framework cases. The "retrospective" cases seeking damages will be assessed as well, since they share similarities to the "prospective" lawsuits and some lawsuits even combine both claims (see novel approach of the Swiss *Asmania v Holcim*, see *subchapter 4.4.3*). The internal corporate/financial disputes, as well as greenwashing litigation, on the other hand, are not going to be assessed.

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[361] "Horizontale Klimagklagen" in German, see [in German] Daniel Ennockl, 'Klimaklagen - strukturen gerichtlicher kontrolle im klimaschutzrecht (Teil 1)' (2022) *29*(4) Recht der Umwelt 137, p 138.
[362] See different typology in Feigerlová (n 163) p 638.
[363] Setzer and Higham 2023 (n 350) pp 35-36.
[364] Ibid p 36.
[365] Ibid pp 37.
[366] See overview: Climate Case Chart, 'ClientEarth v. Shell's Board of Directors' (Sabin Centre for Climate Change Law) <http://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/> accessed 29 September 2023.
[367] See Setzer and Higham 2023 (n 350) pp 39.
[368] See overview: Climate Case Chart, 'Australasian Centre for Corporate Responsibility v Santos' (Sabin Centre for Climate Change Law) <http://climatecasechart.com/non-us-case/australasian-centre-for-corporate-responsibility-v-santos/> accessed 29 September 2023.

As for the structure of this Part, the main objective for case-law categorization will be (following the typology presented above) “type of the claim” and “the statutes and other legal sources supporting the claims.” To be clear, ordering cases below is not dogmatically precise; rather, it should provide a comprehensible overview for the reader, roughly mirroring the logic of *chapters 3.2-3.4*. Hence, I will start with two cases, where international soft law and human rights arguments played an important role. Moreover, both cases - one quasi-judicial and the Shell case - brought substantial media attention. Secondly, the disputes based on human rights due diligence in France will be considered. Third chapter will focus on tort-law cases in other jurisdictions - namely Germany, Italy, and Switzerland.

My goal is to answer (among others), following questions: 1) What is the source law which grounds the corporate responsibility? 2) What roles do human rights arguments play (if any)? 3) How important is previous climate litigation against the state/government? 4) How are specific questions regarding value chain and scope of emissions accounted addressed?

Comparative analysis will be accompanied by an overview table (See **Table 1** below).

	Parties	Judicial body [369]	State	Source-law	UNGPs ?	Objective	Status
Carbon Majors Inquiry	/	NHRI	Philippines	UNGPs	Yes	Identify responsibility of CM	Final report issued
Mileudefensie v Shell	NGO x CM	C	Netherlands	Tort law	Yes	Reduction obligation	Appealed
Notre Affaire v Total	NGO x CM	C	France	HRDD	No	Create *vigilance plan* → reduction obligation	Dismissed
Friends of the Earth v Total	NGO, municipalities x CM	C	France	HRDD	No	Compliance with duty of vigilance	Dismissed
Kaiser et al. v VW	NGO x car producer	C	Germany	Tort law	Yes	Production phase out	Dismissed
Llyulia v RWE	Individual x CM (energy)	C	Germany	Tort law	Yes	Damages	Appealed
Asmania v Holcim	Individual X CM (cement)	C	Switzerland	Tort law	?	Reduction obligation, damages	Filed
Greenpeace Italy v ENI	NGO, individuals x CM	C	Italy	Tort law	Yes	Reduction obligation	Filed

Table 1: Comparison of cases analysed in the Part 4.

[369] Court (C) vs. quasi-judicial body (e.g. NHRI)

4.2 *Carbon Majors Inquiry* and *Shell*: International soft law and human rights in the spotlight

First, I focus on two landmark cases mentioned already in the Introduction. While different in their nature, both brought worldwide attention to the problem of carbon majors and their responsibility. It makes sense to focus on these in the first place, as both (although in different context and from different point) rely on human rights and international soft law (mainly UNGPs).

4.2.1 Carbon Majors Inquiry

"The challenge of [National Human Rights Institutions] *is to test boundaries and create new paths, to be bold and creative, instead of timid and docile; to be more idealistic or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards.*"[370]

Context and the petition

Complaints before quasi-judicial bodies are generally considered part of climate litigation.[371] So far, the most notable cases were cases brought to the international or regional human rights bodies such as Human Rights Committee, Committee on the Rights of the Child and Inter-American Commission on Human Rights.[372] On a national level, National Human Rights Institutions (NHRIs) play a vital role in investigating and monitoring human rights violations.[373] The most remarkable contribution of a NHRI to the climate change case-law is Philippines' Commission on Human Rights (CHRP/Commission) investigation on *"whether the investor-owned Carbon Majors have breached their responsibilities to respect the rights of the Filipino people"*, so called *Carbon Majors Inquiry*.[374] It is the first complex assessment of

[370] *Carbon Majors Inquiry* (Final report of Commission on Human Rights of the Philippines of 2022, Case No. CHR-NI-2016-0001, hereinafter referred to as "Final Report"), pp 4-5, available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.
[371] Setzer and Higham 2023 (n 350) p 8.
[372] See Riccardo Luporini and Annalisa Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' [2023] SSRN Electronic Journal 267, pp 268-269 <http://dx.doi.org/10.2139/ssrn.4230278> accessed 29 September 2023.
[373] See WaterLex, 'CLIMATE CHANGE AND HEALTH: The Role of National Human Rights Institutions, National Accountability Mechanisms' <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Impact/Waterlex.pdf> accessed 29 September 2023.
[374] Also called *Carbon Majors Petition*, *National Inquiry on Climate Change* or *In re Greenpeace Southeast Asia et al.*

NHRI concerning the relationship of climate change and human rights impacts,[375] as well as the first such investigation focused on climate accountability of private parties.[376] However, it is part of a trend of NHRIs focusing on corporate abuses of human rights.[377]

In 2015, the petition was submitted by Greenpeace Southeast Asia supported by other NGOs and individuals.[378] They claimed the interference of climate change into fundamental human rights and demanded accountability of those contributing to climate change.[379] The respondents of the petition are *"all of the existing investor-owned Carbon Majors,"* the largest producers of crude oil, natural gas, coal, and cement.[380] Filing of petition was motivated by the adverse impacts of 2013 Typhoon Haiyan, which killed more than 6000 people[381] and petitioners highlighted an extreme vulnerability of the ecosystems and inhabitants of the archipelagic Philippines.[382] This was supported by personal statements of inhabitants of the Alabat Island and Verde Island Passage.[383] The petition identified the "global standard of expected conduct" as outlined in the Commentary to Principle 11 UNGPs as the main source of carbon majors' obligation.[384]

In 2017 the CHRP accepted the petition and in 2019, announced the finding that carbon majors can be held liable for their contribution to climate change.

CHRP's Final Report

In 2022, the final National Inquiry on Climate Change Report[385] was issued. Carbon majors concerned refused CHRP's jurisdiction, questioning the scope of human rights violations

[375] *Carbon Majors Inquiry* (Final report of Commission on Human Rights of the Philippines of 2022, Case No. CHR-NI-2016-0001, hereinafter referred to as "Final Report"), p 2, available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.
[376] See Phillips and Anschell (n 14) p 240.
[377] Keely Boom, Iman Prihandono and Nadirsyah Hosen, 'A Mandate to Investigate the Carbon Majors and the Climate Crisis: The Philippines Commission on Human Rights Investigation' (2022) 23(1) Journal of Asian Law 57, 61. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263191> accessed online 20 September 2023.
[378] *Carbon Majors Inquiry* (Petition to CHRP of 22 September 2015, Case no. CHR-NI-2016-0001, "Petition") p 1 available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.
[379] Ibid p 3.
[380] Ibid pp 11-13.
[381] Ibid p 2. See also: HRW, 'After Typhoon, Who Is Responsible for Climate Change?' (Human Rights Watch 22 May 2018) <https://www.hrw.org/news/2018/05/22/after-typhoon-who-responsible-climate-change> accessed 30 September 2023.
[382] Petition, p 15.
[383] Ibid pp 15-16.
[384] Ibid pp 17-18.
[385] See Final Report (n 375).

which fall into CHRP's jurisdiction (civil and political rights), stating the non-binding character of UNGPs and other norms cited by the petitioners and raising the issue of territoriality.[386]

CHRP has interpreted its mandate set by 1987 Philippine Constitution[387] broadly, understanding its jurisdiction of *"having the authority to perform [...] non-judicial constitutional mandates."*[388] In order to *"effectively exercise its recommendatory, monitoring, advocacy and other powers," "a complete consideration of all the dimensions of the human rights issues is required."*[389] CHRP is mandated to investigate alleged human rights violations of Filipino people, no matter what territory (whether within or outside of Philippine territory) they occurred in.[390]

To answer the core question of carbon majors' accountability for climate change, CHRP's assessment begins with broad description of nature of human induced climate change[391] and is followed by a detailed section describing climate change as a human rights issue.[392] Report exhaustively enumerates[393] individual and collective rights affected together with their legal sources and examples of their violation caused by the climate change in the Philippines.

Regarding the human rights obligations and climate change, the CHRP begins its examination with duties of the states and concludes that state's inadequate mitigation of climate change may be categorised as a human rights violation.[394] However, *"state's failure to perform [its] duty [to enact and enforce laws to ensure that businesses respect human rights] render businesses their responsibility of respecting human rights."*[395] This leads, finally, to the discussion of corporate accountability. CHRP identifies three sources of corporate responsibility: the UNGPs (*"the global standard of practice expected of States and businesses"*)[396], the Global Compact and the OECD Guidelines (see *3.2.3*). According to the CHRP, Art. 29 UDHR shall be interpreted as a general obligation of everyone, including corporations, to respect human

[386] See exhaustive overview in Boom, Prihandono and Hosen (n 377) pp 65.
[387] 1987 PHILIPPINE CONSTITUTION ARTICLE XVII Section 18
[388] Final Report, p 10.
[389] Final Report, p 10.
[390] Final Report, p 12.
[391] Final Report, pp 26-32.
[392] Final Report pp 32.
[393] Right to life. Right to health. Right to food security. Right to water and sanitation. Right to livelihood. Right to adequate housing Right to preservation of culture. Right to self-determination and development. Right to equality and non-discrimination. Right to a safe, clean, healthy and sustainable environment. Right of future generations and intergenerational equity.
[394] Final Report, p 87.
[395] Final Report, p 88.
[396] Ibid p 90.

rights.[397] According to the CHRP, the UNGPs shall be applied also in the context of climate change. For example, businesses *"must* [...] *include climate change as an element of human rights due diligence* [and] *take appropriate action to mitigate* [GHG] *emissions from their operations and products."*[398] The Commission further draws from the Principles on Climate Change Obligations of Enterprises[399] proposed by the Expert Group on Climate Obligations of Enterprises.[400]

While the above mentioned section deals with general and climate obligations vis-à-vis human rights of all businesses, the arguably most important and cited passage of the Report is the one regarding the role and responsibility of (publicly traded) carbon majors. CHRP made it clear, that carbon majors' contributions to climate change are quantifiable and substantial[401] (see *1.1*) and, importantly, the *"Carbon Majors had early awareness, notice, or knowledge of their products' adverse impacts on the environment and climate system,"* at least since 1965.[402] Additionally, the Commission gathered evidence of carbon majors' climate denial and misinformation campaigns,[403] summarising that *"Carbon Majors, directly by themselves or indirectly through others, singly and/or through concerted action, engaged in willful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system"*[404] - which may contravene the standard of honesty and good faith as set in the Civil Code of the Philippines.[405] Moreover, the CHRP has identified the corporate responsibility of the carbon majors under the Philippine jurisdiction to undertake human rights due diligence and provide remediation,[406] which applies (in accordance with Principle 13 UNGPs) to all entities within the CM's value chain. In the context of the global transition towards clean energy, the CHRP concludes, *"all acts to obfuscate climate science and delay, derail, or obstruct this transition may be a basis for liability."*[407]

[397] Final Report, p 89.
[398] Final Report, p 94.
[399] Final Report, p 96.
[400] See Climate Principles for Enterprises <https://climateprinciplesforenterprises.org/about/> accessed 30 September 2023.
[401] Final Report, pp 98.
[402] Final Report, pp 100-104.
[403] Final Report, pp 104 ff.
[404] Final Report, pp 108-109.
[405] Final Report, p 109.
[406] Final Report, pp 110.
[407] Final Report, p 115.

At the end of the Report, the Commission provides a long list of recommendations for a variety of stakeholders, including governments, carbon majors themselves, financial institutions, other NHRIs, UN, NGOs and even legal practitioners and global citizens, as well as the government of the Philippines.[408] For example, governments are recommended to *"cooperate towards the creation of a legally binding instrument to strengthen implementation of the UNGPs and provide redress mechanisms for victims of human rights harms caused by businesses"*[409] and to *"concretize the responsibility of businesses in the context of climate change."*[410] Carbon majors (and other carbon-intensive industries) are urged by the Commission to e.g. "publicly disclose due diligence and human rights and climate impact assessment results," "desist from all activities that undermine the findings of climate science" and to "cease further exploration of fossil fuels, keep fossil fuels in the ground and lead the just transition to clean energy."[411]

Implications - underestimated "soft" power of NHRIs?

CHRP is not an adjudicative body, it cannot make liability finding and it lacks enforcement power.[412] Lacking the "hard" powers of the court, CHRP used its mandate to the fullest and is considered a landmark case.

First, the CHRP's jurisdiction was certainly not granted, which was noted by the Commission itself, reminiscing the IACHR's refusal to hear the *Inuit Petition* in 2005.[413]

After admitting the petition, the process itself was ambitious - including roundtable discussions with various stakeholders, community dialogues, hearings on the three continents (in Manila, London and New York)[414] and consultations with both legal and science experts. Consultation stage was followed by public hearings.[415] Rather than adversarial, the Commission chose to take a dialogic approach to enhance wide participation of both individuals and institutions.[416]

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[408] See Final Report.
[409] Final Report, p 119.
[410] Final Report, p 120.
[411] Final Report, pp 130-131.
[412] Maria Antonia Tigre and Antoine De Spiegeleir, 'The Role of Human Rights Institutions In Tackling Climate Change: A Case Study of the Philippines' (*Sabin Center for Climate Change Law*, 5 October 2022) <https://blogs.law.columbia.edu/climatechange/2022/10/05/guest-commentary-the-role-of-human-rights-institutions-in-tackling-climate-change-a-case-study-of-the-philippines/> accessed 30 September 2023.
[413] See Final Report pp 2-3, see also Phillips and Anschell (n 14) 243; Annalisa Savaresi, Jacques Hartmann and Ioana Cismas, 'The Impacts of Climate Change and Human Rights: Some Early Reflections on the Carbon Majors Inquiry' [2018] SSRN Electronic Journal 3 <http://dx.doi.org/10.2139/ssrn.3277568> accessed 30 September 2023.
[414] See Tigre and De Spiegeleir (n 412).
[415] Ibid.
[416] Ibid.

Thanks to "unprecedented amount of evidence"[417] supported by amicus curiae briefs[418] the CHRP could have made a persuasive connection between business, human rights, and climate change[419] highlighting that "climate change is also a business and human rights issue."[420] The *Carbon Majors Inquiry* has helped to bring international attention to the corporate climate responsibility and illuminated the role corporations played and continue to play in the climate system. Two elements of the "corporate due diligence argument" highlighted in the *Carbon Majors Inquiry* make a strong case for corporate climate responsibility, that is 1) the share of CM's emissions and 2) the knowledge of CM of the adverse impacts of their activity: *"on the one hand, corporate actors had an obligation of due diligence, and, on the other, that they did not attend to this obligation, thus contributing to climate-related human rights violations in the Philippines and beyond."*[421]

The *Carbon Majors Inquiry* shows the potential of NHRIs in investigating climate accountability. Its finding can motivate the CMs named in the Report to change their behaviour out of fear of "public backlash", inspire courts for their future rulings and legislative bodies to change policy.[422] Furthermore, the evidence gathered in the unique process described above (which would be hard to achieve by the standard court of law) can help change the narrative of lacking corporate accountability and could support future climate action.[423] Its dialogic approach supporting participation of numerous stakeholders is a good example of engagement of a quasi-judicial body in a polycentric climate governance context. The Commission of the Human Rights of the Philippines thus serves as a "role model"[424] and "leading example",[425] which could inspire other NHRIs[426], as well as future climate litigation.[427]

4.2.2 Milieudefensie v Shell (Shell case)

In May 2021, to the Hague District Court in the Netherlands has ordered Shell (parent company of the Shell group, then under the name Royal Dutch Shell plc, RDS) to reduce its CO_2

[417] Ibid.
[418] Phillips and Anschell (n 14) p 244.
[419] Ibid p 247.
[420] Ibid p 249.
[421] Amicus curiea brief, as cited in Savaresi and Hartmann (n 413) p 11.
[422] See Tigre and De Spiegeleir (n 412).
[423] Ibid.
[424] Ibid.
[425] Boom, Prihandono and Hosen (n 377) p 73.
[426] See *Indonesian Youths and others v Indonesia* before Indonesia's NHRI, see Setzer and Higham 2023 (n 350) p 16.
[427] Macchi (n 194) p 98.

emissions of the global operation of the whole group (including end-user emissions) by at least 45 % at end of 2030 (relative to 2019 levels).[428]

The same court has famously issued the first *Urgenda* judgement[429] in 2015 which ordered the Dutch government to follow a more ambitious mitigation pathway. *Urgenda* was upheld by the Hague Court of Appeals[430] and definitively confirmed by the Dutch Supreme Court.[431] The aim of *Milieudefensie*, other NGOs and Dutch citizens to hold Shell accountable has to be understood in this national context. However, the decision of the Hague District Court which established as a first national court[432] a specific mitigation (reduction) obligation to a private actor is revolutionary in a similar way as its judgement in 2015 and attempts to follow a similar path in other jurisdictions are already being seen.[433]

The Facts and the Dispute

In April 2019, the environmental association Milieudefensie together with other six NGOs and over 17.000 individual plaintiffs filed a class-action lawsuit against Royal Dutch Shell (RDS), a public limited company, the top holding company of the Shell group.[434] They wanted the court to order the RDS to decrease by the end of the 2030 (relative to 2019 levels) the aggregate annual volume of all CO_2 emissions (scope 1, 2 and 3) caused by the activities of the Shell group by 45 %, alternatively at least by 35 % or 25 %. Moreover, they asked the court to rule that the aggregate volume of emissions caused by the Shell group constitutes an unlawful act

[428] *Rechtsbank Den Haag* (Haag District Court), *Milieudefensie v Shell* (26 May 2021), C/09/571932/HA ZA 19-379 (ECLI:NL:RBDHA:2021:5337), Englisch version available from <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339> accessed 30 September 2023.
[429] *Rechtsbank Den Haag* (Haag District Court), *Urgenda Foundation v The State of the Netherlands* (24 June 2015), C/09/456689/HA ZA 13-1396 (ECLI:NL:RBDHA:2015:7196), English translation available from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&showbutton=true&keyword=ECLI%3aNL%3aRBDHA%3a2015%3a7196.> accessed 30 September 2023.
[430] *Gerechtshof Den Haag* (Haag Court of Appeals) *Urgenda Foundation v The State of the Netherlands* (10 October 2018), 200.178.245/01 (ECLI:NL:GHDHA:2018:2610), English translation from: < https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2018:2610 > accessed 30 September 2023.
[431] *Hoge Raad* (Supreme Court of the Netherlands), *Urgenda Foundation v The State of the Netherlands* (20 December 2019), ECLI:NL:HR:2019:2007, English translation available from: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007> accessed 30 September 2023.
[432] Andrew Sanger, 'FROM AMBITION TO OBLIGATION: ROYAL DUTCH SHELL ORDERED TO REDUCE CO2 EMISSIONS IN LINE WITH PARIS AGREEMENT' (2021) *80*(3) The Cambridge Law Journal 425, 425 <http://dx.doi.org/10.1017/s0008197321000891> accessed 30 September 2023; Benoit Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation' (2022) 11(2) Transnational Environmental Law 407, p 408 <http://dx.doi.org/10.1017/s2047102522000103> accessed 30 September 2023.
[433] Mayer (n 432) p 408.
[434] *Milieudefensie v Shell*, paras 2.2.1.-2.2.2.

against the plaintiffs and that the RDS acts unlawfully if it fails to reduce its annual level of emissions.[435]

Building on the *Urgenda* case-law, the plaintiffs have argued, that RDS as a parent company has an obligation based on the unwritten standard of care codified in the Dutch Civil Code to contribute to the prevention of climate change through the corporate policy it determines for the Shell group, thus has an obligation to reduce its CO_2 emissions. This standard of care could be interpreted by the so-called *Kelderluik* criteria,[436] human rights violations and the soft law such as UNGP.[437] According to the Milieudefensie et. al, *"RDS violates this obligation or is at risk of violating this obligation with a hazardous and disastrous corporate policy for the Shell group, which in no way is consistent with the global climate target to prevent a dangerous climate change for the protection of mankind, the human environment and nature."*[438]

Jurisdiction and conflict of laws

The Court has accepted the standing of the plaintiffs, with the exception of the individuals, whose interest was the same as the interest of the common interest of the class action,[439] and the NGO ActionAid, which represented the world's population.[440] Interests of current and future generations of the world's population, were not suitable to be admitted under the need of "similar interest", for the huge differences between the consequences of the climate change in the various areas of the world.[441] On the other hand, the interests of current and future generations of Dutch residents are admissible as a part of the class action, as the above mentioned *"differences are much smaller and of a different nature than the mutual differences when it concerns the entire global population."*[442]

The court has dismissed the objections of the RDS regarding the choice of law. Climate change is an environmental damage in the sense of the Art. 7 Rome II, which enables the person seeking compensation to choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred (*lex loci commissi delicti*). The broader interpretation of Art. 7 Rome II gave a way to apply Dutch law,[443] as *"the Netherlands is 'the country in*

[435] *Milieudefensie v RDS*, para 3.1.
[436] *Hoge Raad* (Dutch Supreme Court), *Kelderluik* (5 November 1965), ECLI:NL:HR:1965:AB7079.
[437] *Milieudefensie v Shell*, para 3.2.
[438] Ibid.
[439] *Milieudefensie v Shell*, para 4.7.
[440] See Mayer (n 432) p 409.
[441] Ibid para 4.2.3.
[442] Ibid 4.2.4.
[443] *Milieudefensie v Shell*, para 4.3.

which the event giving rise to the [environmental] *damage occurred', in so far as the group's worldwide CO2 emissions can be traced to strategic decisions made at its headquarters in the Netherlands."*[444] In the Court's interpretation, *"more than one event could give rise to the same environmental damage and, thus, that more than one law could be applicable as lex loci commissi delicti."*[445] Transnational character of climate change and "diffuse" harm it is causing can thus pose a higher risk to litigate corporations for their environmental damage.[446]

The Assessment - obligation based on "unwritten standard of care"

In its assessment, the Hague court has found the violation of the "unwritten standard of care" laid down in Book 6 Section 162 Dutch Civil Code, which is being compared to the common law tort of negligence.[447] Tortious acts according to the Article 6:162 are the acts and omissions *"in violation of ... what according to unwritten law has to be regarded as proper social conduct"*[448] RDS must thus observe the due care exercised in society, when determining the Shell corporate policy.[449] According to Mayer, establishing the Shell's duty of care by the court is convincing.[450] The key question is, however, the content of such duty,[451] which depend on the court's interpretation of the "proper social conduct."

Interpreting the unwritten standard of care and the consequent obligation of RDS to reduce its emissions, the court has taken 14 aspects into consideration,[452] including international law (including soft law), human rights and the Paris Agreement,[453] as well as the context of Shell's business operation (its emission, its control over its subsidiaries) and climate science.[454]

For instance, the Hague court has noted, that emissions of the Shell group *"exceeds the CO2 emissions of many states, including the Netherlands"*[455] and there is no doubt that these emissions contribute to climate change in the Netherlands.[456] This contribution will have *"serious and irreversible consequences for the Dutch citizens."*[457] The court, deriving the

[444] Mayer (n 432) p 410.
[445] Ibid, citing *Milieudefensie v Shell*.
[446] See Mayer (n 432) p 410.
[447] Sanger (n 432) p 426.
[448] Article 6:162 Dutch Civil Code, cited by Mayer (n 432) p 411.
[449] *Milieudefensie v Shell*, para 4.4.1.
[450] Mayer (n 432) p 411.
[451] Mayer (n 432) p 412.
[452] *Milieudefensie v Shell*, para 4.4.2.
[453] Sanger (n 432) p 426.
[454] See ibid.
[455] *Milieudefensie v Shell*, para 4.4.5.
[456] Ibid.
[457] Ibid para 4.4.6.

concrete reduction obligation from the Paris Agreement whose goals are based on "the best available science" of IPCC reports, stressed the importance of the non-state stakeholders to meet the goals of the international climate targets.[458] Building on that, the court has found[459] that only the CO_2 reduction aiming for a net 45 % reduction can possibly limit global warming to 1,5°C or 2°C.[460]

Furthermore, the court has refuted Shell's questioning of the effectiveness of obliging only one of the many polluters, mentioning that *"each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change."* The fact that *"RDS cannot solve this global problem on its own, [...], does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence."*[461]

However, following *Urgenda*, human rights play a central role of the main regulatory framework[462] in the interpretation of the duty of care.[463] Apart from the fundamental human rights to life and to respect for private and family life, enshrined in the ECHR and ICCPR, the court has based its interpretation on the UNGPs soft-law,[464] thus establishing the connection between business conduct and human rights violation. This innovation requires a deeper analysis.

UNGPs as a main interpretative tool

Thanks to the dutch-specific open norm of the unwritten standard of care, the court could have supported the reduction obligation substantively by using the principles enshrined in the UNGPs.

It acknowledges a mere soft law character of the UNGP (*"they do not create any new right nor establish legally binding obligations"*[465]), but stresses its authoritative, *"universally and internationally endorsed"* content. It is thus irrelevant whether RDS has committed itself to

[458] Ibid paras 4.4.26. ff.
[459] For criticism of the court's reasoning in this respect see: Benoit Mayer, 'Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?' (*EJIL: Talk!,* 3 June 2021). available from <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/.> Accessed 30 September 2023.
[460] *Milieudefensie v Shell*, para 4.4.29.
[461] Ibid para 4.4.49.
[462] See Chiara Macchi and Josephine Zeben, 'Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell' (2021) 30(3) Review of European, Comparative & International Environmental Law 409, 411 <http://dx.doi.org/10.1111/reel.12416> accessed 30 September 2023.
[463] *Milieudefensie v Shell* paras 4.4.9.-4.4.10.
[464] Ibid paras 4.4.11. and following.
[465] Ibid para 4.4.11.

the UNGPs or not.[466] Building on Principles 11 and 12 UNGPs, the court stresses the obligation of corporations to respect human rights embodied in ICCPR and other international treaties.[467]

The court interprets the responsibility of businesses to respect human rights formulated in the UNGPs as *"a global standard of expected conduct for all business enterprises wherever they operate."*[468] It is described as an obligation independent of the States' human rights framework, as *"it exists over and above compliance with national laws and regulations protecting human rights."*[469] Thus, "an independent responsibility"[470] of the corporation emerges. This responsibility is not optional and applies everywhere, regardless of the legal context.[471] The responsibility to respect is not passive, it requires action on the part of businesses.[472]

Following the Principle 14 UNGP, the position of the Shell group in the market as a *"major player on the fossil fuels market responsible for significant CO2 emissions"* and complexity of its structure is of importance when establishing the reduction obligation. Court concludes that *"much is expected of the RDS,"* with its policy setting position over the Shell group consisting of more than 1100 companies and operating in 160 countries.[473]

Essentially, the obligation applies to "business relationships" of the corporation, which according to the commentary on Principle 13 UNGPs, includes relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services.[474] Thanks to this interpretation and extension of the responsibility to the value chain, the Hague court could have applied the duty of care to the emissions of the end-users (Scope 3) as well.[475] This is crucial, as around 85% of RDS's emissions are Scope 3 emissions.[476]

Ultimately, the court touches the problem of human rights due diligence and its appropriate integration to the corporate policymaking as assumed by Principle 19 UNGPs, noticing that RDS has known of the "dangerous consequences" of the climate change for a long time and it

[466] Ibid para 4.4.11.
[467] Ibid para 4.4.14.
[468] Ibid para 4.4.13.
[469] Ibid; the court cites the commentary to Principle 11 UNGP.
[470] Ibid para 4.4.13.
[471] Ibid para 4.4.15 citing Principle 23 UNGP.
[472] Ibid.
[473] Ibid para 4.4.16.
[474] Ibid para 4.4.17.
[475] Ibid para 4.4.18.
[476] Ibid para 4.4.19.

"knows that its activities generates significant CO2 emissions worldwide, which undoubtedly contributes to climate change."[477]

Not only that the UNGPs played a key role to specify the reduction obligation of the RDS, the concept of corporate individual responsibility helped the court to address RDS' defence.[478] Shell argued that corporations have no obligation to reduce their emissions independently of the policy framework determined by states.[479] According to the Hague Court, this *"[does] not absolve RDS of its individual responsibility regarding the significant emissions over which it has control and influence."*[480]

Implication and criticism - can we follow the Dutch?

Firstly, the District Court's decision can be read in a larger context of "business and human rights" growing influence on interpretation of tort law.[481] For example, the fact that a parent company can be held liable (that is, it can owe a duty of care) for operations of their subsidiaries in other countries, was not disputed by Shell, as it was confirmed in previous cases (some concerning Shell) in England (*Vendata*, *Okpabi*) and the Netherlands (*Oguru*).[482]

The findings of the *Shell case* are necessary to be taken with reservation, as RDS appealed the landmark decision.[483] Furthermore, the success of the case rests on the interpretation of a specific open norm of Dutch tort law; the interpretation of the duty of care itself was met with criticism by some scholars.[484]

The *Shell case* does not imply the direct corporate obligations arising from human rights, international climate law or soft law principles in UNGPs. Shell's reduction obligation was based on breaching its duty of care set by the Dutch Civil Code. The exact role of human rights and the UNGPs is, thus, less clear.

According to Mayer, role of human rights is "purely ornamental"[485] in the Court's reasoning, as *"the fact that CO2 emissions cause illicit harm can be justified without reference to human*

[477] Ibid para 4.4.20.
[478] See e.g. ibid para 4.4.52.
[479] *Milieudefensie v Shell*, 4.4.51.
[480] Ibid 4.4.52.
[481] Cees van Dam, 'Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms' (2021) European company and financial law review, *18*(5), 714. <https://doi.org/10.1515/ecfr-2021-0032> accessed 30 September 2023.
[482] See ibid.; see also Mayer (n 432) p 409.
[483] As of September 2023, there is no appellate decision yet.
[484] Mayer (n 432).
[485] Mayer (n 432) p 413.

rights law."[486] This interpretation is opposed by Burgers[487] in her response to Mayer, which considers the violation of human rights if global warming rises above 1.5/2°C at the core of the Court's argument. The Court has in its judgement recognized the indirect horizontal effect of human rights in Dutch private law.[488] Moreover, interpretation of the UNGPs have helped to extend the duty of care to the whole Shell group as well as to cover all CO_2 emission, including those of end-users.

Although respecting the non-binding character of the UNGPs, the "open norm" of the unwritten standard of care could have been used as a way to directly apply what would be normally considered soft-law.[489] As noted by André Nollkaemper, without the "trick" of the open norm of the Dutch tort law, the decision of the Court would be rather conservative, international law-wise: *"*[the court] *emphasiz*[ed] *that human rights did not apply directly, that the UNGP did not establish hard law, and that the Paris agreement was not binding for corporations."*[490] It is the open norm developed in the Dutch civil law, not the openness to the international law *per se*,[491] which enabled establishing corporate individual responsibility.

This reasoning has been criticised for building on a "vague concept of due diligence", drawing legally binding conclusions from standards that are actually non-binding.[492] Moreover, the court might have overstated the international consensus concerning the existence of a legal obligation for companies to reduce their Scope 3 emission.[493] Similarly, the exact content of reduction obligation (how much, to what year) was viewed as obscure and unconvincing[494] - this debate depends on to what extent can we consider[495] international climate law and other norms as generally accepted by society, and thus being part of the "standard of care" to which the business conduct will be compared. The Court determined that the scientific findings

[486] Ibid.
[487] Laura Burgers, 'An Apology Leading to Dystopia: Or, Why Fuelling Climate Change is Tortious' (2022) 11(2) Transnational Environmental Law 419 <http://dx.doi.org/10.1017/s2047102522000267> accessed 30 September 2023.
[488] See ibid p 430.
[489] See Ioannis Kampourakis, 'The Power of Open Norms: Milieudefensie et. al. v Royal Dutch Shell' (*Verfassungsblog*, 15 June 2021) available from: <https://verfassungsblog.de/the-power-of-open-norms/> accessed 30 September 2023.
[490] André Nollkaemper, (2021, May 28). 'Shell's Responsibility for Climate Change: An International Law Perspective on a Groundbreaking Judgment' (*Verfassungsblog*, 28 May 2021) available from <https://verfassungsblog.de/shells-responsibility-for-climate-change/> accessed 30 September 2023.
[491] Ibid.
[492] Felix Ekardt, (2021, June 9). 'Shell's Climate Obligation: Climate, Civil Courts, Human Rights, and Balance of Powers' (*Verfassungsblog*, 9 June 2021) available from <https://verfassungsblog.de/shells-climate-obligation/> accessed 30 September 2023.
[493] Macchi and Zeben (n 462) p 413.
[494] Mayer (n 432).
[495] This varies among scholars, see the dispute between Mayer and Burgers.

enshrined in international treaties as well as the UNGPs are authoritative enough (they "*provide a global standard for the building of consensus around corporate responsibility"*)[496] to be part of the "standard of care" which can be reasonably expected from the private actors.

In the large context, the decision is to be welcomed, as the Shell judgement is *"the first authoritative attempt to clarify the climate due diligence responsibilities of a 'carbon major' through a holistic interpretation that builds on the UNGPs, the Paris Agreement and climate science"*[497] with potentially far-reaching consequences and positive overall impact on the development of climate policy under the UNFCCC framework.[498]

To sum up, the *Shell case* is an example of how international soft law can be concretised by courts.[499] Non-binding sources as UNGP could *"acquire a quasi-binding character"*, when consistent practice of interpreting them in light of binding private law norms emerges,[500] potentially paving the way for "bottom up" multilateralism.[501] The cases inspired by the Shell in other jurisdictions will depend on the possibility and willingness of courts "*to develop domestic tort law by drawing on international standards and common goals."*[502]

Lastly, the judgement could also be interpreted as a call to the Dutch legislators to come up with binding policy for non-state actors to ensure achievement of State reduction targets.[503]

4.2.3 Preliminary conclusion

Both cases show the potential of the UNGPs as an "authoritative soft law." The UNGPs have strengthened the arguments presented by the Philippine Commission on Human Rights which could influence judicial practice and motivate legislators in other jurisdictions.

In the Shell case, the UNGPs were crucial for interpretation of allegedly tortious behaviour of a powerful fossil corporation. They helped to clarify what can be expected of carbon majors regarding their reduction obligation, which could include even the scope 3 (end-user) emissions. Similar cases can be expected in the future. However, civil law in other jurisdictions

[496] Sanger (n 432) p 427.
[497] Macchi and Zeben (n 462) p 414.
[498] Ekardt (n 492).
[499] Sanger (n 432) p 427.
[500] See Kampourakis (n 489).
[501] Sanger (n 432) p 428.
[502] Ibid.
[503] See Burgers (487) p 428.

might lack an "open norm" like the Dutch standard of care. In the next chapter, I will examine the effect of HRDD legislation on climate litigation.

4.3 Hardening of soft law: Potential of human rights due diligence

In *subchapter 3.3.2*, the 2017 French Duty of Vigilance Act was described as one of the potential legal sources for a wave of climate litigation against corporations. Two cases against French carbon major TotalEnergies SA (formerly Total SE) are, as of September 2023, in the spotlight.

4.3.1 Notre Affaire à Tous and Others v Total

First case is similarly to *Shell, a* "prospective corporate framework case" with the aim to order TotalEnergies to reduce its GHG emissions.

The complaint

In January 2020, following a letter of formal notice,[504] five NGOs and fourteen municipalities[505] (later joined by the city of Paris and, interestingly, the New York City[506]) have filed a lawsuit before a Nanterre civil court. The plaintiffs provided studies on carbon majors' GHG emissions contribution showing that *"direct and indirect emissions from T*[otal] *represent almost 1 % of the global GHG emissions."*[507] Comparing the data for 2018, *"yearly emissions generated by T*[otal's] *activities are higher than the global volume of territorial GHG emission in France."*[508] This contribution is recognized by the group itself.[509]

To justify their standing, local authorities noted that they *"bear the costs* [climate] *of mitigation and adaptation."*[510] In the complaint, various risks for the municipalities such as heat wave mortality for urban populations, drought for the Mediterranean communities and "flooding and

[504] See summary from Climate Case Chart, 'Notre Affaire à Tous and Others v. Total' (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[505] Sherpa, 'First court decision in the climate litigation against Total: A promising interpretation of the French Duty of Vigilance Law' (*Sherpa*) <https://www.asso-sherpa.org/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law> accessed 30 September 2023.
[506] See summary and documents from Climate Case Chart (n 504) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[507] See *Notre Affaire à Tous and others v Total,* Summons before the Nanterre Judicial Tribunal *(Tribunal judiciaire de Nanterre*) of 28 January 2020 ("Summons"), p 11, unofficial English translation available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200128_NA_complaint.pdf> accessed 30 September 2023.
[508] Ibid p 13
[509] Ibid p 13
[510] Ibid p 16.

submergence" hazards for coastal communities.[511] Thus, legitimate interest for the municipalities shall be given. This is not the only example of French local authorities' involvement in climate litigation.[512]

Firstly, plaintiffs outline the general environmental duty of care which should be enshrined in French Charter for the Environment[513] and the interpretation thereof by the French Constitutional Council. The judge could implement such environmental duty of care independently of legislation and directly establish environmental fault-based liability.[514]

Second, plaintiffs rely on two sources - 1) the duty of vigilance codified in the French Commercial Code and 2) French Civil Code.

Duty of vigilance

Article L. 225-102-4.-I of the French Commercial Code requires the corporation *"to establish, effectively implement and publish a 'plan of vigilance', which: 'shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls (...) as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.'"*[515] The vigilance plan must include: *"1° A mapping that identifies, analyses and ranks risks ; (...) 3° Appropriate actions to mitigate risks or prevent serious violations; (...)"*[516] First Total's vigilance plan under the Vigilance Act did not mention climate change risks at all, while the second vigilance plan adopted in March 2019 is in terms of climate related risks and allegedly required mitigation insufficient.[517]

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[511] Ibid pp 16-17.
[512] *Commune Grande-Synthe v France* - the municipality has shown the legitimate interest, see Climate Case Chart, <http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/> accessed 30 September 2023. The individual plaintiff, Mr. Careme, however, did not have such interest according to the French Council of State - this dispute is, as of September 2023 being heard in front of the ECtHR. See *Careme v France*, see Climate Case Chart, <http://climatecasechart.com/non-us-case/careme-v-france/> accessed 30 September 2023.
[513] Constitutional law n ° 2005-205 of March 1, 2005 relating to the Charter for the Environment, *Loi constitutionnelle 2005-205, 1 March 2005 (Loi constitutionnelle relative à la Charte de l'environnement (1)), JORF 2 March 2005, esp. p. 3697*.
[514] See Summons, pp 17-19.
[515] French Commercial Code, as cited in *Notre Affaire à Tous and others v Total*, 'Formal notice to comply with the Duty of Vigilance Law of 19 June 2019', unofficial translation into English available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[516] Ibid.
[517] See ibid.

Thus, plaintiffs analysed the three risk categories (Risks of 1. human rights and fundamental freedoms, 2. the health and safety of humans and 3. the environment) outlined in the Vigilance Act vis-á-vis Total's contribution to climate change.[518] According to them, Total has violated its obligations *"in identifying and preventing risks linked to global warming."*[519] For example, *"the [...] company very well could have - and should have - set up a map of GHG emissions by each activity sector and each project in order to 'analyze' their respective contributions to global warming and "rank" the resulting risks."*[520]

Most importantly, the measures to reduce risk or prevent damage taken by Total are insufficient and inadequate,[521] presenting a "serious risk";[522] Total's strategy is based "scenarios leading to a rise in global warming higher than 2°C [...] and even 3.7°C"[523] For example, Total's mitigation strategy relies on increase of natural gas production[524] and controversial "carbon capture and storage" (CCS) technologies.[525] Another failure in vigilance is being seen in limited emission reduction objectives (lack of objective achieving carbon neutrality by 2050.[526] Moreover, Total's scope 3 emissions (90 % of Total's emissions, 0,8 % of global emissions) are not covered at all.[527]

The injunctions requested by the plaintiffs are based on article L. 225-102-4 II of the French Code of Commerce which reads: *"II.-When a company is given a formal notice to respect the obligations provided in I and does not comply within three months of the notice, the competent jurisdiction can, at the request of any interested persons, order the company to respect them under penalty, when appropriate."*[528] In short, plaintiffs want the Court to order to adopt a corporate strategy that *"(1) identifies the risks resulting from emissions resulting from the use of goods and services that Total produces, (2) identifies the risks of serious climate-related harms, and (3) undertakes action to ensure the company's activities align with a trajectory compatible with the climate goals of the Paris Agreement."*[529]

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[518] See Summons, pp 20-26.
[519] Ibid pp 27-29.
[520] Ibid 28.
[521] Ibid pp 29.
[522] Ibid p 30.
[523] Ibid p 30.
[524] Ibid pp 31-32.
[525] Ibid p 33.
[526] Ibid p 36.
[527] Ibid p 36.
[528] Ibid p 36.
[529] See report: ECCJ, 'Suing Goliath' (*ECCJ*, September 2021) p 46 <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf> accessed 30 September 2023; in detail Summons, pp 36-42.

Civil liability

In addition to the duty of vigilance, plaintiffs supported their claims on Art. 1252 of the French Civil Code, which establishes the "obligation to prevent ecological damages:"

"Independent from repairing the ecological damage and having received a request to this effect by a person mentioned in Article 1248, the judge may prescribe reasonable steps to prevent or stop the damage from occurring."[530]

In this respect, plaintiffs recall the insufficiency of Total's mitigation strategy and want Total to be order to publish *"appropriate actions to reduce its direct and indirect emissions in line with the Paris Agreement in order to limit global warming to 'significantly below 2°C'"*,[531] which includes setting intermediate objectives for reducing its carbon intensity.[532] For example, Total shall *"implement a gradual cessation, by 2040, of research and exploitation of hydrocarbon deposits by committing to leave 80% of known reserves in the subsoil"* in accordance with the "Hulot law,"[533] which regulates the fossil fuel phase-out on French territory.[534]

Jurisdiction dispute and dismission

The first obstacle of the climate litigation based on the Vigilance Act was jurisdiction itself. Not responding to the merits,[535] Total has opposed the civil jurisdiction and proposed to refer the case to the commercial court.[536] Plaintiffs have stressed the civil nature of the duty of vigilance which regulates the activities of companies towards third parties.[537]

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[530] Art. 1252 The French Civil Code, as cited in Summons p 43.
[531] Summons pp 45.
[532] Ibid p 45.
[533] *Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement* [Law n°2017-1839 of 30 December 2017, ending exploration and extraction of hydrocarbons, and containing several provisions on energy and the environment] - named after former minister of the Environment Nicolas Hulost, see Summons p 9.
[534] See Summons p 9.
[535] See summary at Climate Case Chart <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[536] *Notre Affaire à Tous and others v Total*, Judgement of Nanterre Judicial Court (*Tribunal judiciaire de Nanterre*) of 11 February 2021 ("Nanterre Judgement") p 3 N° RG 20/00915 - Portalis N° DB3R-W-B7E-VQFM, unofficial English translation available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[537] Nanterre Judgement, p 5.

The pre-trial judge of the Nanterre court[538] has rejected Total's objections regarding the civil jurisdiction, which was confirmed by the Versailles Court of Appeals.[539] According to the Nanterre Civil Court, *"the due diligence plan is a legally binding unilateral act of a civil nature, as confirmed not only by its purpose, but also by the characterisation adopted in the parliamentary work on the law."*[540] This is crucial, as in France, commercial courts are composed of elected non-professionals, which are not suited to deal with the disputes arising from the vigilance plan whose *"purpose and the risks it is intended to prevent go far beyond the strict framework of the management of a commercial company."*[541] The plaintiffs do not act in commercial interests, the "general interest" they are representing "goes beyond the commercial dimension of the management of SE Total."[542] In light of this, the plaintiffs' opting to civil jurisdiction was justified.[543]

The case was referred to the Paris Judicial Tribunal (*Tribunal judiciaire de Paris*), which has since 2022 a sole jurisdiction over the duty of vigilance cases.[544] The case was dismissed[545] by the pre-trial judge in July 2023 for procedural reasons.[546] The claim was dismissed formalistically for not fulfilling the alleged *"condition of strict identity between the demands in the formal notice and those in the summons."*[547] Claims based on the French Civil Code were also not admissible, as they were *"made with a view to circumventing the formal notice requirement"* in the Vigilance Law.[548] Moreover, the legal standing of the plaintiffs was disputed, especially standing based on Art. 1248 French Civil Code, which provides they *"can*

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[538] *Judgement of Nanterre Judicial Court of 11 February 2021* ("Nanterre Judgement"), unofficial English translation available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[539] *Notre Affaire à Tous and others v Total*, Judgement of the Versailles Court of Appeal (*Cour d'appel de Versailles*) of November 18 2021, ("Versailles Judgement"), N° RG 21/01661 - N° Portalis DBV3-V-B7F-UL6E, unofficial English translation available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[540] Nanterre Judgement, p 7.
[541] Ibid p 10.
[542] Ibid p 11.
[543] Ibid p 11.
[544] Sherpa, 'Climate change trial against TotalEnergies: action brought by associations and local authorities deemed inadmissible, a worrying ruling' (*Sherpa*) <https://www.asso-sherpa.org/climate-change-trial-against-totalenergies-action-brought-by-associations-and-local-authorities-deemed-inadmissible-a-worrying-ruling> accessed 30 September 2023.
[545] *Notre Affaire à Tous and others v Total*, Judgement of Paris Judicial Tribunal (*Tribunal Judiciaire de Paris*) of 6 July 2023 ("Paris Judgement"), N° RG 22/03403 N° Portalis 352J-W-B7G-CWN5A, unofficial English translation available from < https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.
[546] http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/
[547] https://www.asso-sherpa.org/climate-change-trial-against-totalenergies-action-brought-by-associations-and-local-authorities-deemed-inadmissible-a-worrying-ruling
[548] Paris Judgement, p 26.

take legal action when their territory is affected by ecological damage."[549] As the climate change has not only territorial, but a worldwide effect, making their claims admissible would mean, that *"any local authority in the world could take a company to court on the grounds that its activities contribute to global warming,"* and litigation on such premise would be *"impossible to control."*[550] Local authorities are thus expected to claim *"specific damage affecting their territory, and only their territory"*[551] This restrictive reasoning was criticised by the NGOs, as it contradicts the position of the Council of the State (*Conseil d'État*) in the *Grande-Synthe v France* and prevents the judicial debate on the climate inaction of the TNCs.[552]

4.3.2 Friends of the Earth et al. v Total

The second case against TotalEnergies is of a different nature. Six NGOs from France and Uganda have filed a lawsuit regarding Total's oil projects to build a pipeline across Uganda and Tanzania, the "East African crude oil pipeline" (EACOP)[553] and the Tilenga project.[554]

The NGOs have claimed that Total breaches its duty of vigilance and demanded revision of its vigilance plan.[555] The plaintiffs requested "*an order to take urgent action to prevent the manifestly unlawful disturbance resulting the company's failure to comply with its due diligence obligations. In the alternative, the claimants sought an order, subject to fine, to establish, publish and implement a set of measures in its due diligence plan to prevent (i) serious violations of human rights and fundamental freedoms, human health and safety and (ii) serious environmental damage."*[556] Main focus of the lawsuit is on human rights and direct pollution, but GHG emissions of the project are also covered.[557] Total argued in its response, that its subsidiary operating in Africa is an "autonomous entity," following the "separation principle".[558]

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[549] Ibid p 27.
[550] Ibid p 27.
[551] Ibid p 27.
[552] See Sherpa (n 544).
[553] See details in *2.3.2.*
[554] See official website of Total: TotalEenergies, 'Tilenga and EACOP: acting transparently' (*TotalEnergies*) <https://totalenergies.com/projects/oil/tilenga-and-eacop-acting-transparently> accessed 30 September 2023.
[555] *Friends of the Earth et al. v Total*, see summary at Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/> accessed 30 September 2023.
[556] Ibid.
[557] Ibid.
[558] Schilling-Vacaflor (n 127) p 117.

The fate of the proceedings follows a similar pattern[559] to the *Notre Affaire à Tous and Others v Total*. The civil jurisdiction was confirmed in 2021 by the Court of Cassation (two lower instances have, contrary to the previous case, granted the exclusive commercial jurisdiction[560]). However, on 28 February 2023, the Paris Judicial Tribunal dismissed the claim on procedure in a similar way as *Notre Affaire à Tous and Others v Total* on the basis of the "strict identity condition" described above. Friends of the Earth have shared their disappointment with the decision, denying they have substantially altered their judicial requests from the formal notice.[561]

4.3.3 Preliminary conclusion

As of August 2023, there is no substantial judgement of whether the French carbon major TotalEnergies SE breached its duty of vigilance regarding the human rights consequences of GHG emissions it produces.

So far, the Vigilance Act did not meet the expectations of the civil society and BHR advocates. The willingness of the French Courts to examine the potential breach of corporate duty of vigilance for human rights abuses and environmental degradation was, so far, low. The formalistic approach applies also to the cases which are not climate-related.[562] The case of France illustrates the procedural hurdles for the plaintiffs to bring their claim against in the first place. In case of litigation based on the Vigilance Act, the previous success of climate litigation

[559] See overview summary at Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/> accessed 30 September 2023.
[560] To this, Friends of the Earth have commented: *"[...] it is absurd to believe that corporate representatives elected by their peers are the best judge of a situation where lives and entire ecosystems are threatened!"* The Friends of the Earth 2023, cited in Schilling-Vacaflor (n 127) p 117.
[561] See [in French] Les Amis de la Terre France [Friends of the Earth France], 'Projets Tilenga et EACOP de Total: le tribunal judiciaire de Paris botte en touche', <https://www.amisdelaterre.org/projets-tilenga-eacop-total-tribunal-judiciaire-paris-botte-touche/> accessed 30 September 2023.
[562] See e.g. ProDESC, 'PRESS RELEASE EDF IN MEXICO: PARIS COURT MISSES OPPORTUNITY TO PREVENT HUMAN RIGHTS VIOLATIONS' (*Prodesc.org*, 1 December 2021) <https://prodesc.org.mx/en/press-release-edf-in-mexico-paris-court-misses-opportunity-to-prevent-human-rights-violations/> accessed 30 September 2023; FIDH, 'Suez case (Chile): Court dismisses legal action - The French Duty of Vigilance law gutted of its purpose' (International Federation for Human Rights, 2 June 2023) <https://www.fidh.org/en/issues/litigation/litigation-against-companies/suez-case-chile-court-dismisses-legal-action-the-french-duty-of> accessed 30 September 2023.

against the French state[563] (*Notre Affaire à Tous and Others v France*[564], *Grande-Synthe v France*) did not materialize.

It is still too early to judge the effect of the French Vigilance Act on climate litigation, as there are other climate lawsuits pending[565] and both the practice of the NGOs and that of courts might evolve. Nevertheless, it can be concluded that human rights play a rather peripheral role. They are the background for adoption of the Vigilance Act but are not at core of the plaintiffs' arguments - that is the *vigilance duty* of the French TNCs.

4.4 Re-examining tort law

As of August 2023, the only successful tort law climate case against a corporation is the *Shell* case, which was - for its importance and unique argumentation open to international and human rights law - debated above. To complete this Part, I will focus on several tort law cases again.

Although the first examples of climate litigation against corporations were filed in the USA,[566] they won't be considered below, for a couple of important reasons. First, theoretically viable Alien Tort Statute (ATS) of 1789, which gives US federal courts jurisdiction over the claims of non-U.S. citizens for torts committed in violation of international (human rights) law, is practically ill-suited for the climate litigation, especially under the recent Supreme Court case-law.[567] Second, all cases to date in the US jurisdiction were dismissed[568] for similar reasons - mainly for the insufficient causal link or under the *political question doctrine*, which leaves the

[563] See Julien Bétaille, 'Climate litigation in France, a reflection of trends in environmental litigation' [2022] elni Review 63 <http://dx.doi.org/10.46850/elni.2022.11> accessed 30 September 2023; Marta Torre-Schaub, 'Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France' (2021) 22(8) German Law Journal 1445, XXXX <http://dx.doi.org/10.1017/glj.2021.86> accessed 30 September 2023.

[564] See summary at Climate Case Chart (*Sabin Center of Climate Change Law*) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/> accessed 30 September 2023.

[565] See e.g. *Envol Vert et al. v Casino* (Summary at Climate Case Chart: <http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/> accessed 30 September 2023); *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v BNP Paribas*, (Summary at Climate Case Chart: <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/> accessed 30 September 2023).

[566] Setzer and Higham (n 350) p 21.

[567] See Myanna F. Dellinger, 'Post-Jesner Climate Change Lawsuits Under the Alien Tort Statute' (2019) 44 Columbia Journal of Environmental Law <https://ssrn.com/abstract=3446079> accessed 30 September 2023.

[568] See e.g. *Kivalina v ExxonMobil Corp* (2012) 696 F 3d 849; *American Electric Power Co v Connecticut* (2011) 564 US 410; *City of New York v Chevron Corporation* (2021) 993 F 3d 81. (Mayer p 10); *Comer v Murphy Oil USA,*F. Supp. 2d 849 (S.D. Miss. 2012).

issues of climate change to the legislation and the government.[569] Third, obviously, the US legal and political context is different to the one of Europe.

Similar could be said of other common law jurisdictions. *Smith v Fonterra*[570] was dismissed by New Zealand courts on the grounds of causation.[571] The Court of Appeal also noted its "lack of democratic legitimacy."[572]

Thus, only cases from European civil law jurisdiction will be further considered. The core of the analysis will be the most successful climate tort case so far, *Lliuya v RWE*, followed by a couple of other recent German cases and one Italian and one Swiss case.

4.4.1 Liuya v RWE AG: Carbon major can be held liable for damages

Seeking injunctive relief in terms of mitigating its GHG impact is not the only goal of climate change litigations against large private emitters. Claimants may file lawsuits focused on receiving damages for the historic emissions of a corporation. The "retrospective 'polluter pays principle'"[573] cases are best represented by apparently the first European climate case against the corporation[574], *Lliuya v RWE AG*.

Facts and status of the case

In 2015, Saul Luciano Lliuya has (supported by the NGO Germanwatch) filed a lawsuit against RWE AG to claim damages for Europe's largest energy company contribution to climate change. Lliuya is a citizen of Peru from the city Huaraz in the Andes. His home as well as the whole region is threatened by a severe risk of flooding due to melting of glacial ice, a phenomenon called the "Glacial Lake Outburst Flood."[575] German RWE AG is, according to the study from 2014 (see *chapter 1.1*), responsible for about 0,47 % of historic GHG

[569] See Ennockl (n 361) p 141.
[570] See summary at Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/> accessed 30 September 2023.
[571] Mareike Rumpf, 'Climate change litigation and the private sector – assessing the liability risk for multinational corporations and the way forward for strategic litigation', *Climate Change, Responsibility and Liability* (Nomos 2022) 461 <http://dx.doi.org/10.5771/9783748930990-441> accessed 30 September 2023.
[572] Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/> accessed 30 September 2023.

[573] Setzer and Higham (n 350) p 35.
[574] Ennockl (n 361) p 138.
[575] See Vedantha Kumar and Will Frank, 'Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like Lliuya Succeed under English Nuisance Laws?' (2018) 12(2) Carbon & Climate Law Review 110, 111 <http://dx.doi.org/10.21552/cclr/2018/2/6> accessed 30 September 2023.

emissions.[576] Thus, Lliuya asks for compensation in the amount of 0,47 % of the adaptive measures needed to protect his house from flooding.[577]

The first instance court (the District Court of Essen) has rejected the claim *"finding an absence of a sufficient causative link between the defendant's actions and the relevant interference"*[578] In 2017, the appeal court - the Higher Regional Court of Hamm (*Oberlandesgericht Hamm*, OLG Hamm) has, after an oral hearing, held the case admissible and issued an Indicative Court Order to proceed to the evidence stage,[579] ordering expert opinions on facts disputed by the parties (the extent of the flood risk and the potential damage and the scientific basis for a causal link between RWE's emissions and the potential damage).[580] This move shows, that the Court considers the plaintiffs' argumentation to be justified.[581] Whole process was prolonged by Covid pandemics - the Court visit to Huaraz under the media attention[582] took place in May 2022.[583] It was probably the first time a German court held an on-site meeting abroad,[584] signalling the importance of the case. Expert report is expected in summer 2023 and final oral hearing will take place during autumn/winter 2023.[585]

Jurisdiction, conflict of laws, justiciability and standing

The jurisdiction of the case results from Art. 4 (1) and Art. 63 (1) of the Brussels Regulation: *"persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."* (Art. 4 (1) Brussels Regulation) As RWE has its headquarters in Germany, the German jurisdiction was given.[586]

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[576] *Lliuya v RWE AG*, Summons of 23 November 2015 ("Lluya Summons") available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20151123_Case-No.-2-O-28515-Essen-Regional-Court_complaint-1.pdf>, p 18.
[577] See Kumar and Frank (n 575) p 111.
[578] Ibid p 111.
[579] See Climate Case Chart, 'Lliuya v. RWE AG' (Sabin Center for Climate Law) <https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/> accessed 30 September 2023.
[580] Kumar and Frank (n 575) p 111; see also *Lliuya v RWE AG*, 'Indicative Court Order' of OLG Hamm [Higher Regional Court of Hamnn] of 30 November 2017, English translation available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20171130_Case-No.-2-O-28515-Essen-Regional-Court_order.pdf> accessed 30 September 2023.
[581] See [in German] Walter Frenz, *Grundzüge des Klimaschutzrechts* (Springer 2022) p 450.
[582] See e.g. The Guardian, 'German judges visit Peru glacial lake in unprecedented climate crisis lawsuit' (*The Guardian*, 27 May 2022) <https://www.theguardian.com/environment/2022/may/27/peru-lake-palcacocha-climate-crisis-lawsuit> accessed 30 September 2023.
[583] See Climate Case, 'Timeline' (Rwe.climatecase.org) <https://rwe.climatecase.org/en/legal#timeline> accessed 30 September 2023.
[584] Silvia Steininger and Juan Camilo Herrera, 'Travelling Courts and Strategic Visitation' (*Verfassungsblog*, 1 June 2022) <https://verfassungsblog.de/travelling-courts-and-strategic-visitation/> accessed 30 September 2023.
[585] Climate Case, 'Timeline' (Rwe.climatecase.org) <https://rwe.climatecase.org/en/legal#timeline> accessed 30 September 2023.
[586] See Kumar and Frank (n 575) p 113.

Like in *Shell*, the law applicable was chosen in line with Art. 7 Rome II, an exception to Art. 4 Rome II for environmental damage. Unlike in forward-looking Shell, in case of retrospective *Lliuya*, one might question the applicability of rules set in Rome II for historic emissions which were emitted prior entry of the regulation into force. As the defendant did not dispute this argument and GHG emissions leading to climate change are on an 'ongoing basis,' the choice of German law was possible.[587]

Finally, the Lliuya's claim is justiciable following the case-law in different jurisdictions.[588] Regarding the standing to be sued, Lliuya's claim relies on § 31 of the German Civil Code (BGB), *"which holds companies responsible for acts of the Board (or its members) in the course of business that give rise to a liability."*[589] Plaintiff argues that GHG emissions of RWE's subsidiaries (which it owns wholly) are attributable to the parent company and thus the defendant is responsible for all GHG emissions resulting from its subsidiaries' operations.[590]

Basis for the claim and causality

The basis for the claim is the general provision for protection against property interference § 1004 of the BGB[591], "claim for removal and injunction" (*"Beseitigungs- und Unterlassungsanspruch"*) It reads as follows:

"(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference."

This nuisance norm is typical for neighbourhood disputes, can it be then attributable to the transnational case, whose parties are separated by more than 10 000 kilometres?[592]

Three conditions are required to establish liability: Damage, unlawful/negligent conduct, and the causation between the two. Damage as a risk to the plaintiff's property is indisputable.

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[587] See Kumar and Frank (n 575) pp 113-114.
[588] Ibid p 114.
[589] See ibid p 115.
[590] Lluya Summons p 21, see also Kumar and Frank (n 575) p 115.
[591] See e.g. Climate Case, 'Neigbourhood' (*Rwe.climatecase.org*) https://rwe.climatecase.org/en/legal#neighbourhood> accessed 30 September 2023; See also [in German] Anne Kling, 'Die Klimaklage gegen RWE – Die Geltendmachung von Klimafolgeschäden auf dem Privatrechtsweg' (2018) 51(2) Kritische Justiz 213, p 215 <http://dx.doi.org/10.5771/0023-4834-2018-2-213> accessed 30 September 2023.
[592] Ibid p 216.

Unlawfulness is questionable when the defendant operates in compliance with national regulations. (e.g. has an official permit for a power plant).[593]

The biggest hurdle remains the causation.[594] The Essen Court has followed the strict *conditio sine qua non* (or 'but for') test typical for many jurisdictions. The test requires that *"in the absence of the defendant's actions, the relevant impairment would not have occurred."*[595] In the view of the Essen Court, in the case of damage caused by contribution to climate change, the causation "*is incomparably more complex, multipolar, and therefore more unclear, while also being scientifically disputed. When innumerable major and minor emitters release greenhouse gases, which merge indistinguishably with each other, alter each other, and finally, through highly complex natural processes, induce a change in the climate, it is impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage."*[596]

The plaintiff argues for two alternatives to a 'but for' test. The nature of climate change may require rethinking the traditional view on causality, as there is no way to distinguish causal and non-causal GHG emissions regarding their contribution to climate change: Every single ton of CO_2 is climate-relevant.[597] Thus, modification of the causal test is based on attribution of GHG emissions to the defendant in terms of the extent of the risk-increase (*Zurechnung nach dem Ausmaß der Risikoerhöhung*), which would allow liability according to proportionality (*Haftung nach Proportionalität*).[598] We may go further and argue for abandoning the 'but for' test in climate cases altogether: It would be unjust to absolve the defendant from liability just because other actors are involved.[599]

Implications

The long-awaited judgement of the OLG Hamm might be the most important to date in the field of corporate climate litigation, especially if the plaintiff succeeds in establishing a causal

[593] See Daniel Ennöckl and Judith Fitz, 'Climate change litigation in Germany and Austria – an overview', Climate Change, Responsibility and Liability (Nomos 2022) p 290 <http://dx.doi.org/10.5771/9783748930990-281> accessed 30 September 2023.
[594] See more detailed [in German]: Frenz (n 581) pp 451-457.
[595] Kumar and Frank (n 575) p 117.
[596] *Lliuya v RWE AG*, Judgment of Landesgericht Essen [Regional Court Essen] of 15 December 2016 [Regional Court Essen], unofficial English translation, see <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf> accessed 30 September 2023.
[597] See Ennockl (n 361) p 139.
[598] See Ennockl (n 361) p 139; see also Kumar and Frank (n 575) pp 118.
[599] Kumar and Frank (n 575) p 118.

link between RWE's emissions and the imminent damage in Peru, thus accepting revolutionary 'liability according to proportionality' approach.

Allowing the case to be justiciable and arranging a symbolically significant court visit in a foreign country, the Hamm Court has already helped to shift the paradigm. Similar paths might be pursued in both civil law and common law[600] jurisdictions.

4.4.2 German automobile industry

In September 2021, two NGOs, Greenpeace and Deutsche Umwelthilfe (DUH), announced they are starting legal proceedings against Volkswagen (VW), Mercedes-Benz and BMW.[601] The successful climate litigation *Neubauer et al. v Germany*[602] before the German Federal Constitutional Court (*Bundesverfassungsgerich,* BVerfG) of April 2021, as well as the progression in the *Lliuya* case could be the motivation behind the lawsuits.

All four cases (*Kaiser, et al. v Volkswagen AG*; *Allhoff-Cramer v Volkswagen AG*; *DUH v Mercedes-Benz AG*; *DUH v BMW AG)*[603] are based on similar assumptions and have similar goals - to order (among other claims) large automobile producers to phase-out the sale of vehicles with internal combustion engines by 2030 (that would be five years earlier than what is planned on a European level within Fit for 55 package).[604] Otherwise, they would fail to decarbonise in line with the goals of the Paris Agreement.[605] All lawsuits are based on Art. 1004 BGB and deal with similar issues like *Lliuya*. Shortly, I will highlight couple of point from the *Kaiser et al.* Summons.[606]

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[600] E.g. in England, see Kumar and Frank (n 575).

[601] As well as the oil and gas company Wintershall, see press release, available from Climate Case Chart (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221209_18687_press-release-1.pdf.> accessed 30 September 2023.

[602] *Neubauer et al v Germany*, see summary from Climate Case Chart: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/> accessed 30 September 2023.

[603] Current status of the cases can be found at Climate Case Chart, 'Non-US Jurisdiction: Germany' <https://climatecasechart.com/non-us-jurisdiction/germany/ > accessed 30 September 2023.

[604] EP, 'Fit for 55: zero CO2 emissions for new cars and vans in 2035' (*European Parliament*, 14 February 2023) <https://www.europarl.europa.eu/news/en/press-room/20230210IPR74715/fit-for-55-zero-co2-emissions-for-new-cars-and-vans-in-2035> accessed 30 September 2023.

[605] See Greenpeace International, 'Greenpeace sues Volkswagen for fuelling the climate crisis and violating future freedom and property rights' (*Greenpeace* International, 9 November 2021) <https://www.greenpeace.org/international/press-release/50625/greenpeace-sues-volkswagen-for-fuelling-the-climate-crisis-and-violating-future-freedom-and-property-rights/> accessed 30 September 2023.

[606] *Kaiser et al. v VW*, Summons of 8 November 2021 ("VW Summons"), see English translation from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211111_16019_petition.pdf> accessed 30 September 2023.

In *Kaiser et al. v VW*, plaintiffs remind that Volkswagen AG is a major player in the industry and its real emission for Scope 1-3 makes a significant global contribution (e.g. 1 % of annual GHG emission for 2018).[607] 98 % of VW's GHG emissions are from scope 3, that is from the usage of their products by end-users.[608] Volkswagen AG, as a parent company, has control of the climate protection policies of the whole group (including its subsidiaries like Czech-based *Škoda Auto*).[609]

Regarding unlawfulness of the VW's conduct (breaching its 'duty of care' - *Verkehrssicherungspflicht*), plaintiffs refer to the UNGPs in order to prove attributability of (scope 3) emissions along the supply chain. According to the plaintiffs, *"attributability already results from a kind of 'state of the art' concerning the role of companies in society"*[610] Plaintiffs acknowledge the soft-law nature of the UNGPs, but comment that they may *"express the common expectation of the community [...]"* and thus *"can serve as a benchmark for legally required behaviour."*[611]

Expectation of due diligence (*Verkehrserwartung*) is allegedly determined by the German Constitution (the Basic Law, *Grundgesetz*, hereinafter GG), by the human rights and Art. 20a GG ('constitutional expectation' of 'protection of the natural foundations of life and animals'). From Art. 20a GG, the BVerfG could have in case *Neubauer* established a so-called 'climate protection requirement' (*Klimaschutzgebot*) on German state institutions.[612] *Klimaschutzgebot* implies that future violations of human rights through the overuse of the remaining carbon budget should be taken into consideration.[613] Plaintiffs now argue that under the indirect horizontal effect doctrine, these constitutional principles should be accepted by the civil courts when assessing tort law.

None of these cases were so far, as of August 2023, successful, and may be further clarified by the upper instances.[614]

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[607] Ibid pp 29-30.
[608] Ibid p 33.
[609] Ibid pp 33.
[610] Ibid p 82.
[611] Ibid p 82.
[612] See Frenz (n 581) pp 158.
[613] VW Summons, p 83.
[614] See Reuters, 'German carmakers survive first round of climate lawsuits' (*Reuters*, 24 February 2023) <https://www.reuters.com/business/sustainable-business/german-farmers-lawsuit-against-volkswagen-demanding-tighter-carbon-emissions-2023-02-24/> accessed 30 September 2023.

4.4.3. Asmania et al. v Holcim

Another case considered is *Asmania et al. v Holcim*. The lawsuit was filed in February 2023 in the Cantonal Court Zug (*Kantonsgericht Zug*). Like *Lliuya*, *Asmania et al.* is formally led by individual plaintiffs from the Global South country, supported by the NGOs. Plaintiffs are residents of Indonesian island Pari, which is vulnerable to sea level rise. In the press release, individual stories of the plaintiffs (fishermen and guesthouse owners) are highlighted, including gender inequality, impacts on plaintiffs' properties and businesses and the whole ecosystem).[615] Defendant in this case is Swiss-based cement carbon major Holcim, responsible for cca 0,42 % of historic CO_2 emissions since 1750, which is more than twice of the emissions of Switzerland.[616] Holcim's "Net Zero Plan" to decrease its emissions by 21 % by 2030 is clearly insufficient.

Asmania et al. is arguably the most ambitious lawsuit, as it demands *"proportional compensation for climate change-related damages on Pari, 2) reduction of CO2 emissions by 43 % by 2030 and by 69% by 2040, relative to 2019 levels, 3) financial contribution to adaptation measures on Pari."*[617] The claim is based on Swiss civil law,[618] however, the press release emphasises the importance of human rights.[619]

4.4.4 Greenpeace Italy et al. v ENI et al.

In May 2023, twelve Italian citizens and two NGOs filed a lawsuit[620] against Italian oil company ENI and its two majority shareholders, the Italian Ministry of Economy and Finance and public development bank *Cassa Depositi e Prestiti S.p.A.* (controlled by the said Ministry).

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[615] Press release of 12 July 2023 available from Climate Case Chart (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220712_17478_press-release.pdf> accessed 30 September 2023.
[616] Ibid.
[617] *Asmania v Holcim* from Climate Case Chart, 'Asmania v Holcim' (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/> accessed 30 September 2023.
[618] *Article 28 of the Swiss Civil Code (infringement of personal rights) and Article 41 of the Swiss Code of Obligations (redress for unjust harm)*, see Climate Case Chart, 'Asmania v Holcim' (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/> accessed 30 September 2023.
[619] See press release (n 615) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220712_17478_press-release.pdf> accessed 30 September 2023.
[620] *Greenpeace Italy et al. v ENI et* al, see summary available at Climate Case Chart, (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/greenpeace-italy-et-al-v-eni-spa-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-spa/> accessed 30 September 2023.

Admittedly[621] inspired by *Milieudefensie v Shell*, the argumentation of the plaintiffs is based mainly on Italian tort law provision set in Art. 2043 of Italian Civil Code),[622] which establishes the liability for non-contractual damages:[623] *"any intentional or negligent act which causes unjust damage to others shall oblige the person who has committed the act to compensate for the damage."*[624] Art. 2043 is according to Italian case-law a reference standard to protect human rights.[625] Individual plaintiffs come from areas seriously affected by the climate change impacts such as coastal erosion, droughts or melting glaciers,[626] which gives the human rights dimension importance. The causality shall be given in accordance with the so called 'more probable than not' criterion which comes into consideration in case of plurality of hypothetical causes which give rise to a harmful event.[627]

To demonstrate unlawfulness of the ENI's conduct, UNGPs (*"authoritative and internationally approved normative instrument"*)[628] and OECD Guidelines are recalled as *"internationally recognised standards"* which constitute an individual corporate responsibility for human rights, reminiscing that ENI commits itself to respect human rights in line with UNGPs and OECD Guidelines.

The plaintiffs want the Rome Civil Court to order the defendants liable for past and potential future damages to human rights and order to adopt a strategy to reduce emissions in line with the Paris Agreement (by 45 % relative to 2020).[629]

The similar path based on civil tort law was firstly approached by the pending case against the Italian state, *A Sud et al. v Italy*.[630]

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[621] See e.g. *Greenpeace Italy et al. v ENI*, Summons of 9 May 2023 ("ENI Summons") English translation available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230509_19287_summons.pdf>, pp 90, 98. Accessed 30 September 2023.
[622] Italian Civil Code.
[623] Climate Rights Database, <https://climaterightsdatabase.com/2023/05/09/greenpeace-italy-recommon-et-al-v-eni-italian-ministry-of-economy-and-finance-et-al/> accessed 30 September 2023.
[624] ENI Summons, p 98.
[625] Ibid p 98.
[626] Press release of Greenpeace International, 'Italian citizens and organisations sue fossil fuel company ENI for human rights violations and climate change impacts' (*Greenpeace International*, 9 May 2023) <https://www.greenpeace.org/international/press-release/59686/italian-citizens-and-organisations-sue-fossil-fuel-company-eni-for-human-rights-violations-and-climate-change-impacts/> accessed 30 September 2023.
[627] ENI Summons, p 100.
[628] Ibid p 104.
[629] Climate Case Chart (n 620).
[630] *A Sud et al. v Italy*, summary at Climate Case Chart (Sabin Center for Climate Change Law) <https://climatecasechart.com/non-us-case/a-sud-et-al-v-italy/> accessed 30 September 2023.

4.4.5 Preliminary conclusion

Most cases analysed in this work (including *Milieudefensie v Shell*) are of a civil law nature. Civil law institutes present many challenges to the plaintiffs, namely, to prove causation link. Tort law cases increasingly follow *Milieudefensie* and use human rights and international soft law to support their claims. While under the current legislation, success of tort-based corporate climate litigation is plausible, the substantial hurdles could be overcome by legislative changes. Strengthening climate due diligence norms, ensuring shared (proportional) corporate liability for climate change, and providing a fair distribution of the burden of proof might help victims of climate-induced harm access justice in civil courts.[631] Moreover, financial risk in case of losing the civil case shall be mitigated allowing the court to balance the costs in the case of financial disparity among parties.[632]

[631] See on example of *Lliuya*, ECCJ (n 529) p 20.
[632] See ibid p 21.

5. Comparative analysis

The last Part will be devoted to comparative analysis and discussion – summary of the main outcomes of the thesis.

5.1 Change of the paradigm

Firstly, it can be concluded that there is a growing trend to enhance corporate accountability in the context of climate change litigation. In my view, four drivers can be identified: 1) Role of attribution science, 2) Business and Human Rights discourse (and BHR litigation as a forerunner), 3) pressure from civil society and NGOs and 4) previous successful climate litigation against state.

1) Role of science attribution can be hardly overstated in the climate litigation field – attribution of the GHG emissions to the actor who is being sued is crucial for litigation's success.[633] The studies of the CAI, their public outreach and popularisation of the term carbon majors have arguably influenced the public debate on fossil fuel corporations' responsibility for climate change. Besides that, since filing the *Carbon Majors Inquiry*, the CAIs studies are the core evidence of most climate lawsuits studied for the purpose of this thesis.

2) Business and Human Rights litigation can be described as a forerunner of the recent wave of corporate climate litigation. Human rights litigations for violations unrelated to climate change are dealing with similar hurdles like corporate climate litigations. Successful human rights litigation can thus shape case-law on issues like responsibility of a parent company for human rights violations of the subsidiary in a favourable way for the climate litigation.[634] This was, e.g., the case in the Netherlands: In *Milieudefensie* Shell did not dispute it is liable for the activity of its overseas subsidiaries, as it was proven in the *Oguru* case.[635] Moreover, whole BHR discourse has over the decades helped to illuminate corporate human rights violations, which led to adoption of the UNGPs, national due diligence laws and other instruments.

[633] See (especially pp 7-9 for private law context) e.g. Michael Burger, Jessica Wentz and Radley Horton, 'THE LAW AND SCIENCE OF CLIMATE CHANGE ATTRIBUTION: EXECUTIVE SUMMARY' < https://climate.law.columbia.edu/sites/default/files/content/docs/Executive%20Summary.Law%20and%20Science%20of%20Climate%20Change%20Attribution.pdf> accessed 30 September 2023.
[634] Climate litigation cases are often enlisted among other non-climate human rights litigations, see e.g. report of ECCJ (n 529).
[635] See van Dam (n 481).

3) Outside the US, most strategic climate litigations against corporations have been filed by NGOs. In all the above-assessed cases (see *Table 1*) NGO (or multiple NGOs) either was a plaintiff or it supported an individual. Support of NGOs in terms of financing and promotion is essential in strategic litigation.[636] International NGOs like Greenpeace or Friends of the Earth can support cases in many jurisdictions. Their involvement in the climate litigation field shows they are important actors in polycentric climate governance. Individuals, however, play an important role too. First, they come usually from the affected region of the Global South (*Lliuya*; *Asmania*) or within the jurisdiction of the defendant corporation (*Greenpeace Italy et al.*; *Allhoff-Cramer*) – and communicate a certain message – for example vulnerability of their home in contrast to the powerful corporation in the Global North. Second, damage to an individual might be crucial for the success of, e.g., human rights arguments, or proving damages.

4) In three jurisdictions studied (the Netherlands, France, and Germany), filing the strategic litigation against a private party was preceded by a successful strategic climate litigation against the state. In the Netherlands, the success of *Urgenda* was replicated in the *Shell case* (at least in the first instance). In France, successful *Notre Affaire a Tous* and *Grande Synthe* did so far did not help CCL based on the French Vigilance Act. In Germany, filing *Lliuya* preceded the groundbreaking *Neubauer v Germany*, but *Neubauer* is a clear inspiration for a wave of litigation against German car manufacturers (See *4.4.2*). Moreover, climate change litigation is unique for transnational collaboration of fellow plaintiffs – arguments successfully presented in one jurisdiction can inspire litigants abroad. This is clearly the case with *Shell* case, whose approach (including its emphasis on human rights and global soft-law standards) and overall aim at direct reduction obligation of corporation are being replicated elsewhere (*Asmania et al.*; *Greenpeace Italy et al.*). This could be similar in case of a favourable judgment in *Lliuya*.

5.2 Source of accountability – are human rights and international soft law answers to the legal questions?

Most of the thesis was devoted to the search for the relevant ground for corporate responsibility with human rights in mind. What follows from this quest?

[636] See Rumpf (n 571) p 451.

From the above-assessed cases follows there are two potential ways to establish corporate accountability in national jurisdiction: 1) national mandatory due diligence law, 2) national civil (tort) law.

5.2.1 Human rights due diligence laws

The first is hard to judge, as the only country with mandatory due diligence law which also provides individuals and NGOs with a possibility to file a lawsuit, is France. The scepticism toward the Vigilance Act described in s*ubchapter 3.3.2* was confirmed by recent (2023) judgements of the Paris Judicial Tribunal. Initial uncertainty whether the vigilance cases fall under the jurisdiction of civil or commercial court stresses the importance of clear and binding rules in due diligence laws. Achieving effective access to justice on the basis of such laws seems difficult; the unsuccessful litigations under the Vigilance Act can be a call for stronger due diligence laws.

(Not only) in the context of French cases, the ECCJ suggests changing legislation. For example, the legislator should *"define the due diligence duty not as a narrow and superficial compliance-orientated process, but as a standard of conduct which include effectively implementing concrete measures to prevent and mitigate risks of human rights violations and environmental harm."*[637] Moreover, due diligence laws should be more specific towards the "climate obligations": *"New legislation should enforce obligations on companies to reduce and account for their climate change impacts, including their own emissions and their indirect greenhouse gas emissions through their global value chains. Legislation should specify criteria for corporate climate targets and ensure that companies set and pursue concrete goals to bring them in line with the 1.5-degree target scenario of the Paris Agreement."* On top of that, injunctive relief shall be provided.[638]

The nature of human rights due diligence laws in Europe will be shaped by the Corporate Sustainability Due Diligence Directive, whose scope is yet to be determined by the European institutions (See *3.3.1*).

Due diligence laws set obligation to the corporations to respect human rights, the consequences of not respecting due diligence obligation (private/public law) depend on legislator. Mandatory human rights due diligence laws risk being a mere "tick-box" laws (see arguments in *3.3.3*).

[637] ECCJ (n 529) p 44.
[638] Ibid.

Some scholars argue for a more holistic approach, proposing a new, rights-based approach to the business models and the whole economy: *"State-level efforts would be much more effective in promoting substantive equality if driven by a rights-based approach rather than a market logic."*[639] These questions have implications for behaviour of corporations in the climate system, but are way beyond the scope of this work.

5.2.2 National tort law – playground for human rights and UNGPs?

Most represented are the cases based on national tort law. In my view, tort law has some advantages due to its potential openness to flexible interpretation. It is also a viable pathway for those damaged by climate change (e.g.in the Global South) to achieve justice in the courts for the possibility of transnational litigation. The nature of tort law is arguably subsidiary to other law systems as according to Burgers, "*its primary goal is to correct relational injustices that were not prevented by other areas of law."*[640] It is thus fitting in case when legislator does not respond to the problem (in this case, corporate emissions leading to climate change) in terms of public law regulation. Additionally, general civil tort claims are similar across jurisdictions (of both civil and common-law traditions)[641] and success in one jurisdiction might be more easily replicated compared to (national) constitutional/public law cases.

Human rights might play a role in interpretation of civil norms. This was the case of *Urgenda* and *Shell* in the Netherlands and similar arguments are used in other jurisdictions. Expectation to respect human rights as set in UNGPs or OECD Guidelines may provide a reference for the court whether the defendant acted unlawfully.

Global "standards of expected conduct" as UNGPs can support lawsuits against corporations to overcome some other obstacles, like establishing responsibility for the conduct of subsidiaries and accountability for emissions produced along the whole supply chain, including Scope 3 emissions. In all of these, UNGPs have been useful and may gain on importance.

Moreover, human rights might be important in the case of their indirect horizontal effect on civil law, as is the case in the constitutional argumentation in the *Kaiser et al. v VW* petition.

The biggest obstacle to establishing the tort claim is arguably the causation. *Conditio sine qua non* test does not correspond to the logic of "diffuse" climate-caused harm and its strict

[639] See Leite (n 308).
[640] Burgers (n 467) p 424.
[641] See German-English comparison in Kumar and Frank (n 575).

application represents an unjust barrier to the victims of climate change. *Liability according to proportionality* proposed in *Lliuya* seems like an appropriate solution; judicial assessment of the German case is important to future litigation efforts. On the other hand, one might ask, where would be the limits to the "proportional liability." *Ad absurdum*, every individual could be liable for her share of GHG emissions.

5.3 Prospects of corporate climate litigation

The corporate climate litigation is increasingly more diverse.

Since the first lawsuits in the USA (See *chapter 4.4*), the logical targets of corporate climate litigation are the carbon majors, whose power and influence were thoroughly examined in this work. It is also easier to scientifically attribute their emissions to the climate damage.[642] Apart from oil and gas producers (Shell, ENI and Total), energy (RWE) and cement companies (Holcim) fall under the category of carbon majors. Other industries are recently in the spotlight and the German automobile producers are only one example of many. One blind spot is represented by agriculture and land use – as food production is influenced by a handful of TNCs.[643] Production of fossil fuels or emission-intensive commodities can be clearly linked to climate change. What about production linked to deforestation?[644] With advancement of attribution science, other industries might be subjects to climate litigation. This trend makes sense even from the perspective of the UNGPs, whose scope is universal to all private companies.

The claims filed are more and more ambitious and innovative, as illustrate the lawsuits against VW, BMW and Mercedes-Benz in Germany and *Asmania v Holcim* in Switzerland, where both contribution for damages and establishing emissions reduction obligation are sought. Also, claims based on different legal sources (greenwashing cases based on consumer law, corporate law) are gaining on prominence.

However, many important issues summarized in *Chapter 5.2* remain unresolved. **Development of two profile cases, *Shell* and *Lliuya*, will be fundamental for the future of corporate**

[642] See Rumpf (n 571) p 478.
[643] Ibid p 477.
[644] See e.g. French bank BNP Paribas sued for its contribution to deforestation, see Climate Case Chart (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/> accessed 30 September 2023.

climate litigation. Plaintiffs in other jurisdictions will however continue filing *Shell*- and *Lliuya*-like cases independently on the progression in the Dutch or German jurisdictions.

This work has shown, that, so far, the most perspective *fora* for corporate climate litigation are European civil law jurisdictions. In common law countries (USA and New Zealand, see Chapter 4.4), corporate climate litigation did not prove any success.[645] Thanks to the provisions of the European international private law, it is easy to establish jurisdiction in a country of company's residence, as well as to choose (in case of environmental damage) between the law of the country where the damage occurred (*lex loci damni*) and in which the event giving rise to the damage occurred (*lex loci delicti comissi*).

Another blind spot are the cases filed in the Global South. As TNCs have their headquarters in the Global North countries, the disputes, however transnational, will be considered by the courts in the Global North. Cases like *Lliuya* and *Asmania* show the North-South divide and aim at overcoming it. However, northern judges deciding about damage felt in the South thousand kilometres afar resemble neo-colonialism,[646] and reminds us of injustices of international political/economical (and legal) system. Difficulty to achieve justice (the barriers identified are standing, financial resources and lack of expertise)[647] in the Global South jurisdictions is one of the major governance gaps today and low number of corporate climate lawsuits[648] there is one of its manifestations. In this respect, international law instruments like binding Business and Human Rights Treaty (see 3.2.2) might offer more power to the Global

[645] In the US, the situation might change in the following years, see The Guardian, ''Game changing': spate of US lawsuits calls big oil to account for climate crisis' (7 June 2023) <https://www.theguardian.com/us-news/2023/jun/07/climate-crisis-big-oil-lawsuits-constitution> accessed 30 September 2023. After a long "jurisdictional battle," the plethora of US cases will be heard in front of state courts, which seems more favourable to the plaintiffs. See The Guardian, ''Like a dam breaking': experts hail decision to let US climate lawsuits advance' (25 April 2023) <https://www.theguardian.com/environment/2023/apr/25/experts-hail-decision-us-climate-lawsuits-advance> accessed 30 September 2023.

[646] This was remarked regarding the judicial visit of Greman judges in the *Lliuya* case in Peru: Steininger and Herrera (n 584).

[647] Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9(1) Transnational Environmental Law 77, p 95 <http://dx.doi.org/10.1017/s2047102519000268> accessed 30 September 2023.

[648] The Nigerian cases *Gbemre v SPDC* of 2005 and *COPW v NNPC* of 2018 could be recalled. See Climate Case Chart <https://climatecasechart.com/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/> accessed 30 September 2023; Climate Case Chart: <http://climatecasechart.com/non-us-case/centre-for-oil-pollution-watch-copw-vs-nnpc-2018-supreme-court-of-nigeria/> accessed 30 September 2023. See e.g. Bukola Faturoti, Godswill Agbaitoro and Obinna Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?' (2019) 27(2) African Journal of International and Comparative Law 225<http://dx.doi.org/10.3366/ajicl.2019.0270> accessed 30 September 2023.; U Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) 15(2) Carbon & Climate Law Review 158 <http://dx.doi.org/10.21552/cclr/2021/2/7> accessed 30 September 2023.

South states to regulate TNCs. In the situation of unstable judiciary, there is a potential of soft powers of quasi-judicial mechanisms represented by National Human Rights Institutions, which was shown on an example of the Philippines.

What is the effect of corporate climate litigation? A lot has been written on the (in)effectiveness of climate litigation in general, and it is not the question I am asking in my work. In my opinion, criticism of climate litigation and disappointment therewith comes from misunderstanding the purpose of strategic litigation, which goes beyond winning a legal claim.[649] While the *"extent to which climate litigation* […] *results in new climate rules and policies* [is unclear]*"*,[650] according to the IPPC, climate litigation *"can affect the outcome and ambition of climate governance."*[651] In case of corporate climate litigation, one figure is easier to measure: a firm value. A working paper of Grantham Research Institute on Climate Change and the Environment concludes, that *"a filing or an unfavourable court decision in a climate case reduced firm value by -0.41% on average, relative to expected values."* Filing a climate lawsuit against a carbon major has on average larger effect: 0.51 % firm value reduction. Unfavourable judgment led to -1.50 % in firm value.[652] Corporate climate lawsuits are thus a vital part of a growing pressure on carbon majors to undertake decarbonization necessary for the transition to green economy.

Thus, strategic climate litigation can lead to both change in governance and legislation and change of company's behaviour. It is now accepted and researched part of global polycentric climate governance. Importance of (corporate) climate litigation can be expected to grow with the inevitable progression of climate crisis and will be hopefully accompanied by the growing government regulation and more effective (inter)national mechanisms.

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[649] Rumpf (n 571) p 443,

[650] IPCC, *Climate Change 2022: Mitigation of Climate Change*, Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p 1377 <https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf> accessed 30 September 2023.

[651] Ibid p 125.

[652] See Misato Sato, Glen Gostlow, Catherine Higham and others, 'Impacts of climate litigation on firm value' (Grantham Research Institute on Climate Change and the Environment, May 2023), Working Paper No. 397, ISSN 2515-5717) p 1 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf> accessed 30 September 2023.

Conclusion

To navigate myself in the multidisciplinary topic of corporate climate litigation was, at times, a challenge. I had to deal with differences of various legal systems and complexities of respective lawsuits (including procedural peculiarities), as well as with the questions beyond law. Writing such a work in English, which is neither my native language nor the language of my studies, was another challenge.

I hope that the outcome presented to the reader is nevertheless comprehensible summary of the problem of corporate climate litigation in the context of corporate responsibility for human rights.

I shared my partial conclusions throughout the work and especially in the previous Part. Here, I will offer only a summary of what has been concluded above and identify some topics for future research.

To the main research question "**how the human rights obligations of corporations could help enhance the accountability of corporations?"**, three points can be made:

1) Corporate climate litigation is part of a **broader Business and Human Rights narrative**, whose roots can be traced to the 1970s. Instruments and norms which resulted from the efforts of BHR scholars and activists, like human rights due diligence and principles enshrined in UNGPs and other soft law instruments now offer a tool for climate litigants. BHR movement also changed the traditional view that corporation is responsible to its shareholders only, paving the way for corporate climate/human rights litigation based on corporate social/environmental/climate responsibility.

2) Corporate climate lawsuits are often **framed as human rights cases** (built on a story of an individual plaintiff, whose rights were violated by climate change), even though they are based e.g., on civil law. This might be helpful to fulfil the 'strategic' purpose of the litigation.

3) Most importantly**, responsibility to respect human rights which follows from international soft law might be accepted by (civil) courts as a "global standard of expected conduct."** If such practice develops, we might agree with a hypothesis, that **there is a "climate due diligence"[653] or "corporate climate responsibility"[654] in the making.**

[653] Macchi 2021 (n 194).
[654] Weber and Hösli (n 178) pp 83-92.

To sum up, in current legal system(s), human rights might play an important role for a successful strategic climate litigation against a corporation. However, in many cases, they are not necessary and giving weight to human rights violations would be superfluous. On the other hands, strengthening corporate responsibility to respect, e.g., by implementing UNGPs into regional/national binding laws could help further address climate-induced harm.

While writing the thesis, other questions have arisen and they were covered only on the periphery:

1) Global South climate litigation is still underestimated topic as well as the South-North relationship and should be focused on more. This is precisely the area where BHR approach can bring solutions.

2) While civil/tort law was identified as a most fruitful approach for corporate climate litigation, it was not systematically analysed in this work. Civil law in the context of climate change (litigation) could be a focus of a future examination. While at the beginning, my view on plausibility of the "civil legal way" was rather sceptical, I can see it as a potential pathway now. This will depend on persuasiveness of strategic litigations' claims, as well as on judicial assessment and potential changes in legislation.

3) Corporate law was eventually not covered at all. For future research, I identify two areas: First is the current corporate law as a basis for a climate claim.[655] Second would be to approach corporate law from a critical perspective. Like civil law, corporate law is based on liberal principles which might not be suitable for the challenges of 21st century. Climate change is "legally disruptive,"[656] and it might be time to rethink traditional and undisputed concepts and legal principles like limited liability and shareholder supremacy to make corporate sphere compliant with the ecology and planetary boundaries. [657] These fundamental questions are not only beyond scope of this work, but also beyond expertise of lawyers and legal scholars.

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[655] See *ClientEarth v Shell's Board of Directors* summary at Climate Case Chart: <https://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/> accessed 30 September 2023. The lawsuit is an aftermath of Shell's non-compliance with the *Milieudefensie v Shell* judgment.

[656] Affolder (n 343).

[657] See e.g. Beate Sjjfjell and Mark Taylor, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' [2015] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.2610583> accessed 30 September 2023; Beate Sjåfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' [2019] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3444050> accessed 30 September 2023; Colin Mayer, 'Reinventing the corporation' (2016) 4 Journal of the British Academy 53, <http://dx.doi.org/10.5871/jba/004.053> accessed 30 September 2023.

Of course, it was impossible to cover all possible disputes. For example, quasi-judicial mechanisms based on OECD Guidelines were omitted[658] in the analysis and litigations in common law countries were mentioned only briefly.

For sure, climate litigation cannot be viewed as a magical solution to the climate crisis. Strategic lawsuits can (with a help of their human rights focus) change the public opinion as well as the judicial assessment of accountability in the context of changing climate or inspire legislators and governments to address the unexpected impacts of the crisis on the relations between private parties. Rising popularity of climate litigation should not encourage members of parliaments and ministers to absolve their powers to the judiciary: Regulation and its enforcement are crucial, and the consequences of too much freedom for large corporate players could be dire, as shown on example of Nigeria and other global South countries. In Europe, 2022 Russian invasion of Ukraine and subsequent energy crisis present a similar wake up call. Current lack of certainty vis-à-vis corporate climate obligations is a call to change status quo in areas of law which are quite far from the scope of standard climate law. The traditional private law principles of causation in civil law or shareholder primacy in corporate law seem unfit to the current situation and create large injustices worldwide; corporate climate litigation is one of the reactions to such injustice.

Notwithstanding serious barriers our current legal system(s) poses to corporate climate litigation, addressing legal consequences of climate change will become with advancement of the crisis more and more practical issue in many areas of law.[659] I hope this thesis was a small contribution to this debate.

[658] For their significance, see Rumpf (n 571) p 472.
[659] Criminal law and ecocide debate is another topic omitted in the work, yet relevant for the role of fossil fuel corporations, e.g. for their role in creating climate disinformation, for that see book [in Czech] Vojtěch Pecka, *Výroba klimatických dezinformací* (Alarm/UTOPIA LIBRI 2023).

List of Abbreviations

AG [German]	*Aktiengesellschaft* [joint stock company]
ATCA	Alien Tort Claims Act
BHR	Business and Human Rights
BVerfG [German]	*Bundesverfassungsgericht* [German Constitutional Court]
CAI	Climate Accountability Institute
CCL	Climate change litigation
CCS	carbon capture and storage
CHR	Commission on Human Rights (UN)
CHRP	Commission for Human Rights of the Philippines
CM	Carbon major
CSDDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
DUH [German]	*Deutsche Umwelthilfe* [Environmental Action Germany, NGO]
ECCJ	European Centre for Corporate Justice
ECHR	European Convention on Human Rights
ECOSOC	UN's the Economic and Social Council
ECtHR	European Court of Human Rights
EP	European Parliament
ESG	Environmental, Social, Governance
EU	European Union
GG [German]	*Grundgesetz* [German Basic Law]
GHG	Green-house gases
HRC	UN Human Rights Council
HRDD	human rights due diligence
HRDD	Human Rights Due Diligence
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
ILO	International Labor Organization
IPCC	Intergovernmental Panel for Climate Change
LkSG [German]	*Lieferkettensorgfaltspflichtengesetz*
NCP	National Contact Point
NDCs	Nationally determined contributions

NGO	Non-governmental organization
NHRI	National Human Rights Institution
NIEO	New International Economic Order
OECD	The Organization for Economic Cooperation and Development
OHCHR	UNs Office of the High Commissioner on Human Rights
PRR Framework	'Protect, Respect, Remedy' Framework
RDS	Royal Dutch Shell
SPDC	Shell Petroleum Development Company Nigeria Ltd
TNCs	Transnational corporations
UDHR	Universal Declaration on Human Rights
UN	United Nations
UN PRI	UN Principles for Responsible Investment
UNCTC	UN Center for Transnational Corporations
UNFCCC	United Nations Framework Convention for Climate Change
UNGA	UN General Assembly
UNGPs	UN Guiding Principles on Business and Human Rights
WWII	World War II

Sources

Primary sources

1. CASE LAW

International human rights bodies

Inuit Petition, Petition N° P-1413-05, IACHR, 7 December 2005) .

European Court of Human Rights

Verein KlimaSeniorinnen Schweiz and Others v Switzerland, ECtHR case no. 53600/20, Communicated Case 17, March 2021.

Duarte Agostinho and Others v Portugal, ECtHR case no. 39371/20, Communicated Case, 13 November 2020.

Carême v France, ECtHR case no. 7189/21, Relinquishment, 7 June 2022.

National Human Rights Institutions

Philippines

Carbon Majors Inquiry (Final report of Commission on Human Rights of the Philippines of 2022, Case No. CHR-NI-2016-0001, "Final Report") available from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.

Carbon Majors Inquiry (Petition to CHRP of 22 September 2015, Case no. CHR-NI-2016-0001, "Petition") from <https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 29 September 2023.

National Courts

Czechia

Klimatická žaloba ČR v Czech Republic, Judgement (*rozsudek*) of Municipal Court of Prague of 15 June 2022, č. j. 14A 101/2021 – 248.

Judgement of Czech Constitutional Court of 21 October 2008 (*nález*), IV.ÚS 1735/07.

Ecuador

Maria Aguinda y Otros v Chevron Corp., Provincial Court of Justice of Sucumbios 201, No. 002-2003.

England

ClientEarth v Shell's Board of Directors summary at Climate Case Chart: <https://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/> accessed 30 September 2023.

Okpabi and others v Royal Dutch Shell Plc and another, [2021] UKSC 3.

Vedanta Resources PLC and another v Lungowe and others, [2019] UKSC 20.

France

Commune Grande-Synthe v France, Council of State (*Conseil d'etat*), 1 July 2021, N° 427301.

Envol Vert et al. v Casino (Summary at Climate Case Chart: <http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/> accessed 30 September 2023)

Friends of the Earth et al. v Total, see summary of case-law at Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/> accessed 30 September 2023.

Notre Affaire à Tous and others v Total, Judgement of Paris Judicial Tribunal (*Tribunal Judiciaire de Paris*) of 6 July 2023 ("Paris Judgement"), N° RG 22/03403 N° Portalis 352J-W-B7G-CWN5A, unofficial English translation available from < https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.

Notre Affaire à Tous and others v Total, 'Formal notice to comply with the Duty of Vigilance Law of 19 June 2019', unofficial translation into English available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.

Notre Affaire à Tous and others v Total, Judgement of Nanterre Judicial Court (*Tribunal judiciaire de Nanterre*) of 11 February 2021 ("Nanterre Judgement"), N° RG 20/00915 - Portalis N° DB3R-W-B7E-VQFM, unofficial English translation available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.

Notre Affaire à Tous and others v Total, Judgement of the Versailles Court of Appeal (*Cour d'appel de Versailles*) of November 18 2021, ("Versailles Judgement"), N° RG 21/01661 - N° Portalis DBV3-V-B7F-UL6E, unofficial English translation available from <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.

Notre Affaire à Tous and others v Total, Summons before the Nanterre Judicial Tribunal (*Tribunal judiciaire de Nanterre*) of 28 January 2020 ("Summons"), unofficial English translation available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200128_NA_complaint.pdf> accessed 30 September 2023.

Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v BNP Paribas, (Summary at Climate Case Chart: <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/> accessed 30 September 2023).

Notre Affaire à Tous v France, Administrative Court of Paris, 14 October 2021, N°s 1904967, 1904968, 1904972, 1904976/4-1. Climate Case Chart (Sabin Center of Climate Change Law) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/> accessed 30 September 2023.

Germany

Kaiser et al. v VW, Summons of 8 November 2021 ("VW Summons"), see English translation from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211111_16019_petition.pdf> accessed 30 September 2023.

Lliuya v RWE AG, 'Indicative Court Order' of *OLG Hamm* [Higher Regional Court of Hamnn] of 30 November 2017, English translation available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20171130_Case-No.-2-O-28515-Essen-Regional-Court_order.pdf> accessed 30 September 2023.

Lliuya v RWE AG, Judgment of *Landesgericht Essen* of 15 December 2016 [Regional Court Essen], unofficial English translation, see <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf> accessed 30 September 2023.

Lluya v RWE AG, Summons of 23 November 2015 ("Lluya Summons") available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20151123_Case-No.-2-O-28515-Essen-Regional-Court_complaint-1.pdf>,

Lüth, Judgement of BVerfG of 15 January 1958, BVerfGE 7, 198.

Neubauer et al v Germany, see summary from Climate Case Chart: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/> accessed 30 September 2023.

Italy

A Sud et al. v Italy, summary at Climate Case Chart (Sabin Center for Climate Change Law) <https://climatecasechart.com/non-us-case/a-sud-et-al-v-italy/> accessed 30 September 2023.

Greenpeace Italy et al. v ENI, Summons of 9 May 2023 ("ENI Summons") English translation available from <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230509_19287_summons.pdf> accessed 30 September 2023.

Netherlands

Gerechtshof den Haag (Haag Court of Appeals) of 29 January 2021, 200.126.804/01 200.126.834/01, ECLI:NL:GHDHA:2021:132.

Gerechtshof Den Haag (Haag Court of Appeals) *Urgenda Foundation v The State of the Netherlands* (10 October 2018), 200.178.245/01 (ECLI:NL:GHDHA:2018:2610), English translation from: < https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2018:2610 > accessed 30 September 2023.

Hoge Raad (Dutch Supreme Court), *Kelderluik* (5 November 1965), ECLI:NL:HR:1965:AB7079.

Hoge Raad (Supreme Court of the Netherlands), *Urgenda Foundation v The State of the Netherlands* (20 December 2019), ECLI:NL:HR:2019:2007, English translation available from: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007> accessed 30 September 2023.

Rechtsbank Den Haag (Haag District Court), *Milieudefensie v Shell* (26 May 2021), C/09/571932/HA ZA 19-379 (ECLI:NL:RBDHA:2021:5337), Englisch version available from <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339> accessed 30 September 2023.

Rechtsbank Den Haag (Haag District Court), *Urgenda Foundation v The State of the Netherlands* (24 June 2015), C/09/456689/HA ZA 13-1396 (ECLI:NL:RBDHA:2015:7196), English translation available from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&showbutton=true&keyword=ECLI%3aNL%3aRBDHA%3a2015%3a7196.> accessed 30 September 2023.

New Zealand

Smith v Fonterra [2021] NZCA 552. Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/> accessed 30 September 2023.

Nigeria

Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC), Supreme Court of Nigeria, 20 July 2018, SC. 319/2013. Climate Case Chart: <http://climatecasechart.com/non-us-case/centre-for-oil-pollution-watch-copw-vs-nnpc-2018-supreme-court-of-nigeria/> accessed 30 September 2023.

Gbemre v SPDC, Federal High Court of Nigeria, 14 November 2005, Suit no. FHC/B/CS/53/05. Climate Case Chart: <https://climatecasechart.com/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/> accessed 30 September 2023.

Switzerland

Asmania v Holcim (Press releases) from Climate Case Chart, 'Asmania v Holcim' (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/> accessed 30 September 2023.

USA

American Electric Power Co v Connecticut (2011) 564 US 410

City of New York v Chevron Corporation (2021) 993 F 3d 81. (Mayer p 10)

Comer v Murphy Oil USA, F. Supp. 2d 849 (S.D. Miss. 2012).

Kiobel v Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

Kivalina v ExxonMobil Corp (2012) 696 F 3d 849

National Contact Points of the OECD

Germanwatch v VW (OECD Guidelines Complaint) NCP Germany November 2007 available from <http://climatecasechart.com/non-us-case/germanwatch-vs-volkswagen/> accessed 27 September 202

Rete Legalità per il Clima (Legality for Climate Network) and others v ENI (OECD Guidelines Complaint) NCP Italy 2022 available from <http://climatecasechart.com/non-us-case/rete-legalita-per-il-clima-legality-for-climate-network-and-others-v-eni/> accessed 27 September 2023

Global Witness v UK Export Finance (OECD Guidelines Complaint) UK NCP 16 March 2020, available from <http://mneguidelines.oecd.org/database/instances/uk0056.htm > accessed 27 September 2023.

2. INTERNATIONAL TREATIES

Conference of the Parties, *Adoption of the Paris Agreement*, 12 December 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 37 I.L.M. 22 (1998); 2303 U.N.T.S. 162; U.N. Doc FCCC/CP/1997/7/Add.1.

Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), UNGA, 15 December 1972, A/RES/2994, available at: <https://www.refworld.org/docid/3b00f1c840.html> accessed 30 September 2023.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention on Hazardous Wastes), 22 March 1989, United Nations, Treaty Series , vol. 1673, p. 57.

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, United Nations, Treaty Series , vol. 2161, p. 447.

Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, United Nations, Treaty Series, vol. 2256, p. 119.

Universal Declaration of Human Rights, 8 December 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992).

Minamata Convention on Mercury, 10 October 2013, United Nations,Treaty Series,vol. 3202C.N.560.2014

3. UN RESOLUTIONS AND OTHER UN DOCUMENTS

Commission on Human Rights (CHR), 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006), E/CN.4/2006/97

ECOSOC, 'Code of Conduct on Transnational Corporations' E/RES/1987/57 (28 May 1987).

ECOSOC, 'The impact of multinational corporations on the development process and on international relations' E/RES/1721(LIII) (1972)

HRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' A/HRC/RES/26/9 (14 July 2014)

HRC, 'Guiding Principles on Business and Human Rights at 10: taking stock of the first decade Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' A/HRC/47/39 (2021)

HRC, 'Human Rights and Transnational Corporations and Other Business Enterprises' A/HRC/RES/17/4. (6 July 2011).

HRC's resolution (A/HRC/RES/41/21) on "Human Rights and Climate Change."

HRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 January 2009) A/HRC/10/61.

OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' [ST/]HR/PUB/11/4 (2011) <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 27 September 2023.

UN Department of Economic and Social Affairs, 'Multinational corporations in world development' (1973) ST/ECA/190.

UN Human Rights Council (HRC), 'Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) A/HRC/8/.

UNGA, 'Declaration on the Establishment of a New International Economic Order' A/RES/3201(S-VI) (1 May 1974).

4. EU LEGISLATION

Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339/3.

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014) OJ L 330/1.

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199/40.

Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (2017) OJ 130/1.

Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (2021) OJ L 243/1.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351/1

Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance (2020) OJ L 295/23.

5. EU DOCUMENTS

Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on the Duty of Business Diligence for Sustainability and amending Directive (EU) 2019/1937 – General Approach' No 15024/1/22 REV1 (30 November 2022) <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf> accessed 28 September 2023.

EP, 'Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))(2)' (1 June 2023) <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html> accessed 28 September 2023.

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility' COM (2011) 681.

European Commission, 'GREEN PAPER: Promoting a European framework for Corporate Social Responsibility' (Green Paper), COM(2001) 366.

European Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM/2022/71 final.

European Commission, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H. and others, 'Study on due diligence requirements through the supply chain – Final report' (European Commission, 2020) <https://data.europa.eu/doi/10.2838/39830> accessed 28 September 2023.

European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

6. NATIONAL LEGISLATION

Czechia

The Charter of Fundamental Rights and Freedoms of 28 December 1992, No. 2/1993 Coll, *Listina základních práv a svobod*. English translation: < https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf> accessed 30 September 2023.

France

Constitutional law n ° 2005-205 of March 1, 2005 relating to the Charter for the Environment, *Loi constitutionnelle 2005-205, 1 March 2005 (Loi constitutionnelle relative à la Charte de l'environnement (1)), JORF 2 March 2005, esp. p. 3697.*

Law n°2017-1839 of 30 December 2017, ending exploration and extraction of hydrocarbons, and containing several provisions on energy and the environment, *Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement.*

Law No. 2017-399, Duty of Vigilance of Parent and Instructing Companies, *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

Germany

Act on Corporate Due Diligence in Supply Chains of 16 July 2021 [*Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021 (BGBl. I S. 2959)"*]

German Basic Law (*Grundgesetz, GG*), 23 May 1949.

German Civil Code (*Bürgerliches Gesetzbuch, BGB*), in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515). < https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html> accessed 30 September 2023.

Italy

Italian Civil Code (*codice civile*) of 1942.

Netherlands

Child Labor Duty of Care Act of 24 October 2019, *Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid)*.

Dutch Civil Code (*Burgerlijk Wetboek*) of 1992.

Norway

Norwegian Transparency Act of 2021, LOV-2021-06-18-99, *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven).*

Philippines

Philippine Constitution of 2 February 1987. <https://www.officialgazette.gov.ph/constitutions/1987-constitution/> accessed 30 September 2023.

An Act to Ordain and Institute The Civil Code of the Philippines ("Civil Code of the Philippines"), Republic Act No. 386 of 18 June 1949, < https://www.officialgazette.gov.ph/1949/06/18/republic-act-no-386/> accessed 30 September 2023.

Switzerland

Swiss Civil Code, SR/RS 210 (*Schweizerisches Zivilgesetzbuch, ZGB*).

Swiss Code of Obligations, SR/RS 22 (*Obligationenrecht*).

USA

Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350.

Secondary sources

7. BOOKS

Bakan J, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press 2004)

Bartoň M, Kratochvíl J, Kopa M and others, *Základní práva* (Leges 2016).

Beal BD, *Corporate social responsibility: definition, core issues, and recent developments* (SAGE 2014).

Bijlmakers S, *Corporate social responsibility, human rights and the law*. (Routledge 2018).

Cernic JL and Carrillo-Santarelli N, *The future of business and human rights: theoretical and practical considerations for a UN treaty* (Intersentia 2018).

Coen D, Kreienkamp J and Pegram T, *Global Climate Governance* (Cambridge University Press 2020) Accessed online 17 April 2022.

Eklington J, *Cannibals Wit Forks: The Triple Bottom Line of 21st Century Business* (Capstone Publishing Ltd 1997) available from https://www.sdg.services/uploads/9/9/2/1/9921626/cannibalswithforks.pdf accessed 26 September 2023.

Forster J and others, *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press 2018).

Frenz W, *Grundzüge des Klimaschutzrechts* (Springer 2022).

Garver G, *Ecological Law and the Planetary Crisis* (Taylor & Francis Group 2020).

Human Rights Watch (HRW), *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW 1999) <https://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> accessed 26 September 2023.

Karavias M, *Corporate Obligations under International Law* (Oxford University Press 2013).

Kloepfer M, *Umweltgerechtigkeit: Environmental Justice in der Deutschen Rechtsordnung* (Duncker & Humblot GmbH 2006).

Koudelková P, *Společenská odpovědnost firem a organizací: udržitelně o udržitelnosti* (Ekopress 2022).

Maloney M and others, *From Environmental to Ecological Law* (Taylor & Francis Group 2020).

Nolan J and Baumann-Pauly D, *Business and Human Rights: From Principles to Practice* (Taylor & Francis Group 2016).

Parsons L, *Carbon Colonialism* (Manchester University Press 2023).

Pecka V, *Výroba klimatických dezinformací* (Alarm/UTOPIA LIBRI 2023).

Sawyer S, *Small Matter of Suing Chevron* (Duke University Press 2022)

Sobek T and Hapla M, *Filosofie práva* (Nugis Finem Publishing, 2020).

Woods K, *Human Rights and Environmental Sustainability* (Edward Elgar Publishing 2010)

Zumbansen P, *The Oxford handbook of transnational law* (Oxford University Press 2021).

8. ONLINE BOOK CHAPTERS

Affolder N 'Transnational Climate Law', *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) <https://doi.org/10.1093/oxfordhb/9780197547410.013.11> accessed 22 July 2023.

Atapattu S, 'The Right to a Healthy Environment and Climate Change', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108367530.014> accessed 25 September 2023.

Bäckstrand K, Zelli F and Schleifer P, 'Legitimacy and Accountability in Polycentric Climate Governance', *Governing Climate Change* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108284646.020> accessed 25 September 2023.

Boyd DR, 'Catalyst for Change', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108367530.002> accessed 25 September 2023.

Deva S, 'From business or human rights to business and human rights: what next?', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) <http://dx.doi.org/10.4337/9781786436405.00005> accessed 26 September 2023.

Dinah Shelton, 'Human rights and the environment: substantive rights', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010).

Drumbl MA and Uhlířová K, 'Actors and law-making in international environmental law', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) <http://dx.doi.org/10.4337/9781786439710.00008> accessed 26 September 2023.

Jordan A and others, 'Governing Climate Change Polycentrically', *Governing Climate Change* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108284646.002> accessed 25 September 2023.

Karavias M, 'Corporate responsibility for environmental harm', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) <http://dx.doi.org/10.4337/9781786439710.00010> accessed 26 September 2023.

McCorquodale R, 'Human rights due diligence instruments: evaluating the current legislative landscape', *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing 2022) <https://doi-org.ezproxy.is.cuni.cz/10.4337/9781788979832.00013> accessed 28 September 2023.

Ohara K, 'Physical drivers of climate change', *Climate Change in the Anthropocene* (Elsevier 2022) <http://dx.doi.org/10.1016/b978-0-12-820308-8.00011-8> accessed 26 September 2023.

Pedersen OW, 'The European Court of Human Rights and International Environmental Law', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108367530.005> accessed 25 September 2023.

Perreaut Revial M-A, 'International climate law', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) <http://dx.doi.org/10.4337/9781786439710.00023> accessed 25 September 2023.

Perreaut Revial M-A, 'International climate law', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2021) <http://dx.doi.org/10.4337/9781786439710.00023> accessed 26 September 2023.

Philippopoulos-Mihalopoulos A, 'Towards a Critical Environmental Law', *Law and Ecology* (Routledge 2011) <http://dx.doi.org/10.4324/9780203829691-2> accessed 25 September 2023.

Rajamani L, 'Human Rights in the Climate Change Regime', *The Human Right to a Healthy Environment* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108367530.013> accessed 25 September 2023.

Ruggie JG, 'The social construction of the UN Guiding Principles on Business and Human Rights', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) <http://dx.doi.org/10.4337/9781786436405.00009> accessed 25 September 2023.

Rumpf M, 'Climate change litigation and the private sector – assessing the liability risk for multinational corporations and the way forward for strategic litigation', *Climate Change,*

Responsibility and Liability (Nomos 2022) <http://dx.doi.org/10.5771/9783748930990-441> accessed 30 September 2023.

Taylor MB, 'Human rights due diligence in theory and practice', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) <http://dx.doi.org/10.4337/9781786436405.00011> accessed 28 September 2023.

van der Heijden J, 'City and Subnational Governance', *Governing Climate Change* (Cambridge University Press 2018) <http://dx.doi.org/10.1017/9781108284646.006> accessed 25 September 2023.

Wettstein F, 'The history of business and human rights and its relationship with corporate social responsibility', *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) <http://dx.doi.org/10.4337/9781786436405.00007> accessed 26 September 2023.

9. OFFLINE BOOK CHAPTERS

Affolder N, 'Square Pegs and Round Holes?', *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015).

Balounová E, 'Klimatická litigace', *Klimatické právo* (Wolters Kluwer 2022).

de la Fayette LA, 'International liability for damage to the environment', *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010).

Ennöckl D and Fitz J, 'Climate change litigation in Germany and Austria – an overview', Climate Change, Responsibility and Liability (Nomos 2022) 290 <http://dx.doi.org/10.5771/9783748930990-281> accessed 30 September 2023.

Feigerlová M, '"Klimatická odpovědnost" společností', *Klimatické právo* (Wolters Kluwer 2022).

Franco AMS and Fyfe D, 'Voluntary vs. Binding: Civil Society's Claim for a Binding Instrument', In J. *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018).

Frenz W, 'Querschnittsthemen', *Klimaschutzrecht* (Erich Schmidt Verlag GmbH & Co. KG 2022).

Macchi C, 'A Treaty on Business and Human Rights: Problems and Prospects', *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018).

Müllerová H, 'Mezinárodní právo lidských práv a klimatická změna' *Klimatické právo* (Wolters Kluwer 2022).

Perry-Kessaris A, 'Corporate Liability for Environmental Harm', *Research Handbook on International Environmental Law.* (Edward Elgar Publishing 2010) <https://doi.org/10.4337/9781849807265.00028> accessed 26 September 2023.

Stoett P and Omrow DA, 'Transnational Ecoviolence and Crime: Revisiting Environmental Justice and Human Security', *Spheres of Transnational Ecoviolence* (Springer International Publishing 2020).

10. ONLINE ARTICLES

Benjamin L, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5(2) Transnational Environmental Law 353 <http://dx.doi.org/10.1017/s2047102516000194> accessed 25 September 2023.

Bétaille J, 'Climate litigation in France, a reflection of trends in environmental litigation' [2022] elni Review 63 <http://dx.doi.org/10.46850/elni.2022.11> accessed 30 September 2023.

Boom K, Prihandono I and Hosen N, 'A Mandate to Investigate the Carbon Majors and the Climate Crisis: The Philippines Commission on Human Rights Investigation' (2022) *23*(1) Journal of Asian Law 57 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263191> accessed online 20 September 2023.

Burgers L, 'An Apology Leading to Dystopia: Or, Why Fuelling Climate Change is Tortious' (2022) 11(2) Transnational Environmental Law 419 <http://dx.doi.org/10.1017/s2047102522000267> accessed 30 September 2023.

Cantú Rivera H, 'National Action Plans on Business and Human Rights: Progress or Mirage?' (2019) 4(02) Business and Human Rights Journal 213 <http://dx.doi.org/10.1017/bhj.2018.33> accessed 28 September 2023.

Crutzen PJ, 'Geology of mankind' (2002) 415(6867) Nature 23 <http://dx.doi.org/10.1038/415023a> accessed 26 September 2023

Dellinger MF, 'Post-Jesner Climate Change Lawsuits Under the Alien Tort Statute' (2019). 44 Columbia Journal of Environmental Law <https://ssrn.com/abstract=3446079> accessed 30 September 2023.

Dorsch MJ and Flachsland C, 'A Polycentric Approach to Global Climate Governance' (2017) 17(2) Global Environmental Politics 45 <http://dx.doi.org/10.1162/glep_a_00400> accessed 26 September 2023.

Etemire U, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' (2021) 15(2) Carbon & Climate Law Review 158 <http://dx.doi.org/10.21552/cclr/2021/2/7> accessed 30 September 2023.

Faturoti B, Agbaitoro G and Onya O, 'Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?' (2019) 27(2) African Journal of International and Comparative Law 225 <http://dx.doi.org/10.3366/ajicl.2019.0270> accessed 30 September 2023.

Finnemore M and Sikkink K, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organization 887 <http://dx.doi.org/10.1162/002081898550789> accessed 27 September 2023.

Frumhoff PC, Heede R and Oreskes N, 'The climate responsibilities of industrial carbon producers' (2015) 132(2) Climatic Change 157 <http://dx.doi.org/10.1007/s10584-015-1472-5> accessed 25 September 2023.

Frynas JG, Beck MP and Mellahi K, 'Maintaining corporate dominance after decolonization: the 'first mover advantage' of Shell-BP in Nigeria' (2000) 27(85) Review of African Political Economy 407 <http://dx.doi.org/10.1080/03056240008704475> accessed 26 September 2023.

Heede R, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122(1-2) Climatic Change 229 <http://dx.doi.org/10.1007/s10584-013-0986-y> accessed 25 September 2023

Hill C and others, 'Hidden in plain sight: gender analysis of the environmental and social impact assessment of the East African Crude Oil Pipeline' (2021) 39(3) Impact Assessment and Project Appraisal 229 <http://dx.doi.org/10.1080/14615517.2021.1904696> accessed 26 September 2023.

Hira A and Benson-Rea M (eds), *Governing Corporate Social Responsibility in the Apparel Industry after Rana Plaza* (Palgrave Macmillan US 2017) <http://dx.doi.org/10.1057/978-1-137-60179-7> accessed 26 September 2023.

Kling A, 'Die Klimaklage gegen RWE – Die Geltendmachung von Klimafolgeschäden auf dem Privatrechtsweg' (2018) 51(2) Kritische Justiz 213, 215 <http://dx.doi.org/10.5771/0023-4834-2018-2-213> accessed 30 September 2023.

Kotzé LJ and Kim RE, 'Earth system law: The juridical dimensions of earth system governance' (2019) 1 Earth System Governance 100003 <http://dx.doi.org/10.1016/j.esg.2019.100003> accessed 25 September 2023

Krajewski M, Tonstad K and Wohltmann F, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) Business and human rights journal *6*(3) 550 <http://dx.doi.org/10.1017/bhj.2021.43> accessed 28 September 2023.

Kumar V and Frank W, 'Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like Lliuya Succeed under English Nuisance Laws?' (2018) 12(2) Carbon & Climate Law Review 110, 111 <http://dx.doi.org/10.21552/cclr/2018/2/6> accessed 30 September 2023.

Kumm M, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) *7*(4) German Law Journal 341 <http://dx.doi.org/10.1017/s2071832200004727> accessed 28 September 2023.

Leite M, 'Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models' (2023) *8*(2) Business and Human Rights Journal 1, 197-212 <http://dx.doi.org/10.1017/bhj.2023.11> accessed 28 September 2023.

Lenton TM and others, 'Climate tipping points — too risky to bet against' (2019) 575(7784) Nature 592 <http://dx.doi.org/10.1038/d41586-019-03595-0> accessed 25 September 2023.

Luporini R and Savaresi A, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' [2023] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.4230278> accessed 29 September 2023.

Macchi C and Zeben J, 'Business and human rights implications of climate change litigation: Milieudefensie et al . v Royal Dutch Shell' (2021) 30(3) Review of European, Comparative &

International Environmental Law 409 <http://dx.doi.org/10.1111/reel.12416> accessed 30 September 2023.

Macchi, C 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'' *6*(1) Business and human rights journal 93 <http://dx.doi.org/10.1017/bhj.2020.25> accessed 26 September 2023.

Markell DL and Ruhl JB, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' [2011] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.1762886> accessed 29 September 2023.

Mayer B, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation' (2022) 11(2) Transnational Environmental Law 407 <http://dx.doi.org/10.1017/s2047102522000103> accessed 30 September 2023.

Mayer C, 'Reinventing the corporation' (2016) 4 Journal of the British Academy 53, <http://dx.doi.org/10.5871/jba/004.053> accessed 30 September 2023.

Nixson FI and Yamin M, 'The United Nations on transnational corporations: a summary and a critique' (1980) 6(1) British Journal of International Studies 16 <http://dx.doi.org/10.1017/s0260210500114883> accessed 26 September 2023.

Ogwang T and Vanclay F, 'Cut-off and forgotten?: Livelihood disruption, social impacts and food insecurity arising from the East African Crude Oil Pipeline' (2021) 74 Energy Research & Social Science 101970 <http://dx.doi.org/10.1016/j.erss.2021.101970> accessed 26 September 2023.

Ostrom E, 'Polycentric systems for coping with collective action and global environmental change' (2010) 20(4) Global Environmental Change 550 <http://dx.doi.org/10.1016/j.gloenvcha.2010.07.004> accessed 25 September 2023.

Patz C, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) *7*(2) Business and Human Rights Journal 291, 291 <http://dx.doi.org/10.1017/bhj.2022.19> accessed 28 September 2023.

Peel J and Osofsky HM, 'A Rights Turn in Climate Change Litigation?' (2017) 7(1) Transnational Environmental Law 37 <http://dx.doi.org/10.1017/s2047102517000292> accessed 25 September 2023

Percival RV, 'Transnational litigation: what can we learn from Chevron–Ecuador?', *Research Handbook on Transnational Environmental Law* (Edward Elgar Publishing 2020) <http://dx.doi.org/10.4337/9781788119634.00031> accessed 26 September 2023.

Phillips SK and Anschell N, 'Building Business, Human Rights and Climate Change Synergies in Southeast Asia: What the Philippines' National Inquiry on Climate Change Could Mean for ASEAN' (2022) 13(1) Journal of Human Rights and the Environment 238 <http://dx.doi.org/10.4337/jhre.2022.01.10> accessed 20 September 2023.

Quijano G and Lopez C, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' (2021) *6*(2) Business and Human Rights Journal 241 <http://dx.doi.org/10.1017/bhj.2021.7> accessed 28 September 2023.

Ramasastry A, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14(2) Journal of Human Rights 237 <http://dx.doi.org/10.1080/14754835.2015.1037953> accessed 26 September 2023.

Sanger A, 'FROM AMBITION TO OBLIGATION: ROYAL DUTCH SHELL ORDERED TO REDUCE CO2 EMISSIONS IN LINE WITH PARIS AGREEMENT' (2021) *80*(3) The Cambridge Law Journal 425 <http://dx.doi.org/10.1017/s0008197321000891> accessed 30 September 2023.

Savaresi A and and Setzer J, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontier' (2022) 13(1) Journal of Human Rights and the Environment 7 <http://dx.doi.org/10.4337/jhre.2022.01.01> accessed 20 September 2023.

Savaresi A, Hartmann J and Cismas I, 'The Impacts of Climate Change and Human Rights: Some Early Reflections on the Carbon Majors Inquiry' [2018] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3277568> accessed 30 September 2023.

Schilling-Vacaflor A, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2020) 22 Human Rights Review <http://dx.doi.org/10.1007/s12142-020-00607-9> accessed 26 September 2023

Setzer J and Benjamin L, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) 9(1) Transnational Environmental Law 77 <http://dx.doi.org/10.1017/s2047102519000268> accessed 30 September 2023.

Sjåfjell B and Taylor MB, 'Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose' [2019] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3444050> accessed 30 September 2023.

Sjjfjell B and Taylor MB, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' [2015] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.2610583> accessed 30 September 2023.

Spitzer M and Burtscher B, 'Liability for Climate Change: Cases, Challenges and Concepts' (2017) *2017*(2) Journal of European Tort Law 137, 151<http://dx.doi.org/10.1515/jetl-2017-0009> accessed 29 September 2023.

Steffen W and others, 'The emergence and evolution of Earth System Science' (2020) 1(1) Nature Reviews Earth & Environment 54 <http://dx.doi.org/10.1038/s43017-019-0005-6> accessed 25 September 2023.

Steffen W and others, 'The trajectory of the Anthropocene: The Great Acceleration' (2015) 2(1) The Anthropocene Review 81 <http://dx.doi.org/10.1177/2053019614564785> accessed 26 September 2023.

Torre-Schaub M, 'Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France' (2021) 22(8) German Law Journal 1445 <http://dx.doi.org/10.1017/glj.2021.86> accessed 30 September 2023.

van Dam C, 'Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms' (2021) European company and financial law review, *18*(5), 714. <https://doi.org/10.1515/ecfr-2021-0032> accessed 30 September 2023.

Watts MJ, 'Righteous oil? Human rights, the oil complex, and corporate social responsibility' (2005) 30(1) Annual Review of Environment and Resources 373 <http://dx.doi.org/10.1146/annurev.energy.30.050504.144456> accessed 26 September 2023.

Weber RH and Hösli A, 'Corporate Climate Responsibility – The Rise of a New Governance Issue' (2021) sui generis <http://dx.doi.org/10.21257/sg.171> accessed 26 September 2023.

10. OFFLINE ARTICLES

Bobek M, 'Výzkum v právu: reklama na Nike anebo kvantová fyzika?' (2016) 6 Jurisprudence 3.

Ennöckl D 'Klimaklagen - strukturen gerichtlicher kontrolle im klimaschutzrecht (Teil 1)' (2022) *29*(4) Recht der Umwelt 137.

11. BLOG POSTS

Ekardt F, (2021, June 9). 'Shell's Climate Obligation: Climate, Civil Courts, Human Rights, and Balance of Powers' (*Verfassungsblog*, 9 June 2021) available from <https://verfassungsblog.de/shells-climate-obligation/> accessed 30 September 2023.

Kampourakis I, 'The Power of Open Norms: Milieudefensie et. al. v Royal Dutch Shell' (*Verfassungsblog*, 15 June 2021) available from: <https://verfassungsblog.de/the-power-of-open-norms/> accessed 30 September 2023.

Mayer B, 'Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?' (*EJIL: Talk!,* 3 June 2021). available from <https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/.>

Nollkaemper A, (2021, May 28). 'Shell's Responsibility for Climate Change: An International Law Perspective on a Groundbreaking Judgment' (*Verfassungsblog*, 28 May 2021) available from <https://verfassungsblog.de/shells-responsibility-for-climate-change/> accessed 30 September 2023.

Steininger S and Herrera JH, 'Travelling Courts and Strategic Visitation' (*Verfassungsblog*, 1 June 2022) <https://verfassungsblog.de/travelling-courts-and-strategic-visitation/> accessed 30 September 2023.

Tigre MA and De Spiegeleir A, 'The Role of Human Rights Institutions In Tackling Climate Change: A Case Study of the Philippines' (*Sabin Center for Climate Change Law*, 5 October 2022) <https://blogs.law.columbia.edu/climatechange/2022/10/05/guest-commentary-the-role-of-human-rights-institutions-in-tackling-climate-change-a-case-study-of-the-philippines/> accessed 30 September 2023.

12. WEBSITES

Amnesty International, 'Corporate accountability' (Www.Amnesty.Org.) <https://www.amnesty.org/en/what-we-do/corporate-accountability/> accessed 20 September 2023.

Amnesty International, 'EU: European Parliament's vote for new corporate due diligence legislation should strengthen human rights' (Amnesty.org 1 June 2023) <https://www.amnesty.org/en/latest/news/2023/06/eu-european-parliaments-vote-for-new-corporate-due-diligence-legislation-should-strengthen-human-rights/> accessed 28 September 2023.

Amnesty International, 'USA: After almost 1,000 days of arbitrary detention, Steven Donziger's release highlights urgent need for action against SLAPPs' (Amnesty.org, 25 April 2022) <https://www.amnesty.org/en/latest/news/2022/04/usa-steven-donzigers-release/> accessed 26 September 2023

Business & Human rights Resource Centre, 'Briefing by BIICL: The new European Directive on Corporate Sustainability Due Diligence' (Business-humanrights.com) <https://www.business-humanrights.org/en/latest-news/briefing-the-new-european-directive-on-corporate-sustainability-due-diligence/> accessed 28 September 2023.

Business & Human Rights Resource Centre, 'Effective Environmental and Climate Protection in the CSDDD: Challenges and Priorities' (Joint Briefing, 2023) <https://media.business-humanrights.org/media/documents/EN_-_Briefing_on_Environment_and_Climate_in_CSDDD.pdf> accessed 28 September 2023.

Business & Human Rights Resource Centre, 'Shell lawsuit (re oil pollution in Nigeria)' (Business-humanrights.org) <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/> accessed 26 September 2023.

Business & Human Rights Resource Centre, 'Shell lawsuit (re oil spills & Ogale & Bille communities in Nigeria - Okpabi v Shell)' (Business-humanrights.org) <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-spills-ogale-bille-communities-in-nigeria-okpabi-v-shell/> accessed 26 September 2023.

Business and Human Rights Resource Centre, 'Texaco/Chevron lawsuits (re Ecuador)' (Business-humanrights.org) <https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/> accessed 26 September 2023

CAI, <https://climateaccountability.org/images/Carbon_Majors_and_Global_1810_2017_lg.jpg> accessed 25 September 2023.

CAI, <https://climateaccountability.org/wp-content/uploads/2020/12/TopSix-1910-2013.png> accessed 25 September 2023.

Carbon Tracker Initiative, 'Oil and Gas Companies Invest in Production That Will Tip World Towards Climate Catastrophe' (Carbon Tracker Initiative, 8 December 2022) <https://carbontracker.org/oil-and-gas-companies-invest-in-production-that-will-tip-world-towards-climate-catastrophe/> accessed 25 September 2023.

Climate Case Chart (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220712_17478_press-release.pdf> accessed 30 September 2023.

Climate Case Chart (Sabin Center for Climate Change Law) http://climatecasechart.com/non-us-case/klimaticka-zaloba-cr-v-czech-republic/> accessed 26 September 2023

Climate Case Chart (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221209_18687_press-release-1.pdf.> accessed 30 September 2023.

Climate Case Chart (Sabin Center of Climate Change Law) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/> accessed 30 September 2023.

Climate Case Chart (Sabin Centre for Climate Change Law) <http://climatecasechart.com/> accessed 29 September 2023.

Climate Case Chart, 'Australasian Centre for Corporate Responsibility v Santos' (Sabin Centre for Climate Change Law) <http://climatecasechart.com/non-us-case/australasian-centre-for-corporate-responsibility-v-santos/> accessed 29 September 2023.

Climate Case Chart, 'ClientEarth v. Shell's Board of Directors' (Sabin Centre for Climate Change Law) <http://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/> accessed 29 September 2023.

Climate Case Chart, 'Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others' (Sabin Center for Climate Change Law) <http://climatecasechart.com/non-us-case/gbemre-v-shell-petroleum-development-company-of-nigeria-ltd-et-al/> accessed 26 September 2023.

Climate Case Chart, 'Non-US Jurisdiction: Germany' <https://climatecasechart.com/non-us-jurisdiction/germany/ > accessed 30 September 2023.

Climate Case Chart, 'Notre Affaire à Tous and Others v. Total' (*Sabin Center for Climate Change Law*) <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 30 September 2023.

Climate Case Chart, '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' (Sabin Center for Climate Change Law <http://climatecasechart.com/non-us-case/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/> accessed 26 September 2023.

Climate Case Chart, <http://climatecasechart.com/non-us-case/careme-v-france/> accessed 30 September 2023.

Climate Case Chart, <http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/> accessed 30 September 2023

Climate Case, 'Timeline' (Rwe.climatecase.org) <https://rwe.climatecase.org/en/legal#timeline> accessed 30 September 2023.

Climate Copernicus, 'Summer 2023: Hottest on Record' (Climate Copernicus, 5 September 2023) <https://climate.copernicus.eu/summer-2023-hottest-record> accessed 25 September 2023

Climate Files, '1997 Shell Statement of General Business Principles' (Climatefiles.com) <https://www.climatefiles.com/shell/1997-shell-statement-general-business-principles/> Accessed 26 September 2023.

Climate Principles for Enterprises <https://climateprinciplesforenterprises.org/about/> accessed 30 September 2023.

Climate Rights Database, <https://climaterightsdatabase.com/2023/05/09/greenpeace-italy-recommon-et-al-v-eni-italian-ministry-of-economy-and-finance-et-al/> accessed 30 September 2023.

Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights. Online: Countries (Globalnaps.org) <https://globalnaps.org/country/> accessed 28 September 2023.

Douglas Starr, 'Just 90 companies are to blame for most climate change, this "carbon accountant" says.' (Science.org, 25 August 2016) <https://www.science.org/content/article/just-90-companies-are-blame-most-climate-change-carbon-accountant-says> Accessed 20 September 2023.

EarthRights International, 'THE FOSSIL FUEL INDUSTRY'S USE OF SLAPPS AND JUDICIAL HARASSMENT IN THE UNITED STATES' (Earthrights.org, September 12 2022) <https://earthrights.org/publication/the-fossil-fuel-industrys-use-of-slapps-and-judicial-harassment-in-the-united-states/> Accessed 26 September 2023

ECCJ, 'Comparative table: Corporate due diligence laws and legislative proposals in Europe' (ECCJ 21 March 2021) <https://corporatejustice.org/publications/comparative-table-corporate-due-diligence-laws-and-legislative-proposals-in-europe-2/> accessed 28 September 2023.

ECCJ, 'Map: Corporate accountability legislative progress in Europe' (ECCJ 25 January 2023) <https://corporatejustice.org/publications/map-corporate-accountability-legislative-progress-in-europe/> accessed 28 September 2023

Ellena S, 'Negotiations on EU due diligence rules expected to pick up speed in September' (Euractiv.com, 12 July 2023) <https://www.euractiv.com/section/economy-jobs/news/negotiations-on-eu-due-diligence-rules-expected-to-pick-up-speed-in-september/> accessed 28 September 2023.

EP, 'Fit for 55: zero CO2 emissions for new cars and vans in 2035' (*European Parliament*, 14 February 2023) <https://www.europarl.europa.eu/news/en/press-room/20230210IPR74715/fit-for-55-zero-co2-emissions-for-new-cars-and-vans-in-2035> accessed 30 September 2023.

EP, 'MEPs push companies to mitigate their negative social and environmental impact' (EP Press Release, 1 June 2023) <https://www.europarl.europa.eu/news/en/press-room/20230524IPR91907/meps-push-companies-to-mitigate-their-negative-social-and-environmental-impact> accessed 28 September 2023

European Coalition for Corporate Justice, 'EU Parliament gives green light to corporate due diligence law, but still leaves grave loopholes' (ECCJ, 31 May2023) <https://corporatejustice.org/news/eu-parliament-gives-green-light-to-corporate-due-diligence-law-but-still-leaves-grave-loopholes/> accessed 18 September 2023.

FIDH, 'Suez case (Chile): Court dismisses legal action - The French Duty of Vigilance law gutted of its purpose' (International Federation for Human Rights, 2 June 2023) <https://www.fidh.org/en/issues/litigation/litigation-against-companies/suez-case-chile-court-dismisses-legal-action-the-french-duty-of> accessed 30 September 2023.

Friends of the Earth et al. v. Total, see summary at Climate Case Chart (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/> accessed 30 September 2023.

Greenpeace International, 'Greenpeace sues Volkswagen for fuelling the climate crisis and violating future freedom and property rights' (*Greenpeace* International, 9 November 2021) <https://www.greenpeace.org/international/press-release/50625/greenpeace-sues-volkswagen-for-fuelling-the-climate-crisis-and-violating-future-freedom-and-property-rights/> accessed 30 September 2023.

Greenpeace International, 'Italian citizens and organisations sue fossil fuel company ENI for human rights violations and climate change impacts' (*Greenpeace International*, 9 May 2023) <https://www.greenpeace.org/international/press-release/59686/italian-citizens-and-organisations-sue-fossil-fuel-company-eni-for-human-rights-violations-and-climate-change-impacts/> accessed 30 September 2023.

Hayes A, 'What Is Upstream in the Oil and Gas Industry?' (Investopedia, 12 June 2022) <https://www.investopedia.com/terms/u/upstream.asp> accessed 26 September 2023.

HRW, 'After Typhoon, Who Is Responsible for Climate Change?' (Human Rights Watch 22 May 2018) <https://www.hrw.org/news/2018/05/22/after-typhoon-who-responsible-climate-change> accessed 30 September 2023.

Les Amis de la Terre France [Friends of the Earth France], 'Projets Tilenga et EACOP de Total : le tribunal judiciaire de Paris botte en touche', <https://www.amisdelaterre.org/projets-tilenga-eacop-total-tribunal-judiciaire-paris-botte-touche/> accessed 30 September 2023.

OHCHR, 'Mandatory human rights due diligence (mHRDD)' (Ohchr.org) <https://www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd> accessed 28 September 2023.

OHCHR, 'National action plans on business and human rights' (Ohchr.org) <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights> accessed online 27 September 2023.

Oxford Law Faculty, 'OSCOLA: Oxford Standard for Citation of Legal Authorities' (Oxford University Faculty of Law) <https://www.law.ox.ac.uk/oscola> accessed 25 September 2023

ProDESC, 'PRESS RELEASE EDF IN MEXICO: PARIS COURT MISSES OPPORTUNITY TO PREVENT HUMAN RIGHTS VIOLATIONS' (*Prodesc.org*, 1 December 2021) <https://prodesc.org.mx/en/press-release-edf-in-mexico-paris-court-misses-opportunity-to-prevent-human-rights-violations/> accessed 30 September 2023

Reuters, 'German carmakers survive first round of climate lawsuits' (*Reuters*, 24 February 2023) <https://www.reuters.com/business/sustainable-business/german-farmers-lawsuit-against-volkswagen-demanding-tighter-carbon-emissions-2023-02-24/> accessed 30 September 2023.

Reuters, 'Italian court acquits Eni and Shell in Nigerian corruption case' (Reuters, 18 March 2021) <https://www.reuters.com/article/uk-eni-shell-nigeria-idUSKBN2BA0XF> accessed 26 September 2023.

See press release: Climate Accountability Institute. '*Press Release: Carbon Majors: Update of Top Twenty companies 1965-2017' (Climate Accountability Institute*, 20 October 2019) <https://climateaccountability.org/pdf/CAI%20PressRelease%20Top20%20Oct19.pdf > accessed 25 Septmeber 2023.

Shell, 'Royal Dutch Shall plc Changes its Name to Shell plc' (Shell, 21 January 2022) <https://www.shell.com/media/news-and-media-releases/2022/royal-dutch-shell-plc-changes-its-name-to-shell-plc.html> accessed 26 September 2023

Sherpa, 'Climate change trial against TotalEnergies: action brought by associations and local authorities deemed inadmissible, a worrying ruling' (*Sherpa*) <https://www.asso-sherpa.org/climate-change-trial-against-totalenergies-action-brought-by-associations-and-local-authorities-deemed-inadmissible-a-worrying-ruling> accessed 30 September 2023.

Sherpa, 'First court decision in the climate litigation against Total: A promising interpretation of the French Duty of Vigilance Law' (*Sherpa*) <https://www.asso-sherpa.org/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law> accessed 30 September 2023.

Stop EACOP, 'Stop EACOP' <https://www.stopeacop.net/home> accessed 26 September 2023.

Swansea University Library, 'OSCOLA Referencing' (Swansea University Library) <https://libguides.swansea.ac.uk/oscola/home> accessed 25 September 2023.

The Guardian, ''Game changing': spate of US lawsuits calls big oil to account for climate crisis' (7 June 2023) <https://www.theguardian.com/us-news/2023/jun/07/climate-crisis-big-oil-lawsuits-constitution> accessed 30 September 2023.

The Guardian, ''Like a dam breaking': experts hail decision to let US climate lawsuits advance' (25 April 2023) <https://www.theguardian.com/environment/2023/apr/25/experts-hail-decision-us-climate-lawsuits-advance> accessed 30 September 2023.

The Guardian, ''Monstrous' east African oil project will emit vast amounts of carbon, data shows' (The Guardian, 27 October 2022) <https://www.theguardian.com/environment/2022/oct/27/east-african-crude-oil-pipeline-carbon> accessed 26 September 2023.

The Guardian, '"Monster Profits" for Energy Giants Reveal a Self-Destructive Fossil Fuel Resurgence' (9 February 2023) <https://www.theguardian.com/environment/2023/feb/09/profits-energy-fossil-fuel-resurgence-climate-crisis-shell-exxon-bp-chevron-totalenergies> accessed 25 September 2023.

The Guardian, 'German judges visit Peru glacial lake in unprecedented climate crisis lawsuit' (*The Guardian*, 27 May 2022) <https://www.theguardian.com/environment/2022/may/27/peru-lake-palcacocha-climate-crisis-lawsuit> accessed 30 September 2023.

The Guardian, 'Shell's plan to move HQ to London gets Dutch backlash' (The Guardian, 15 November 2021) <https://www.theguardian.com/business/2021/nov/15/shell-move-hq-tax-netherlands-uk> accessed 26 September 2023

The Guardian, 'This lawyer should be world-famous for his battle with Chevron – but he's in jail' (The Guardian, 8 February 2022) <https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich> accessed 26 September 2023.

TotalEenergies, 'Tilenga and EACOP: acting transparently' (*TotalEnergies*) <https://totalenergies.com/projects/oil/tilenga-and-eacop-acting-transparently> accessed 30 September 2023.

UN Global Compact, 'The Ten Principles of the UN Global Compact' (unglobalcompact.org) <https://unglobalcompact.org/what-is-gc/mission/principles> accessed 26 September 2023.

UN PRI, 'What are the Principles for Responsible Investment?' (unpri.org) <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment> accessed 26 September 2023.

Union of International Associations, 'United Nations Centre on Transnational Corporations (UNCTC)' (uia.org) <https://uia.org/s/or/en/1100024712 > accessed 26 September 2023.

Union of International Associations, 'United Nations Commission on Transnational Corporations' (uia.org) <https://uia.org/s/or/en/1100059616> accessed 26 September 2023.

Wikipedia, 'Big Oil' https://en.wikipedia.org/wiki/Big_Oil, accessed 25 September 2023

Wikipedia, 'Petroleum Industry in Nigeria' <https://en.wikipedia.org/wiki/Petroleum_industry_in_Nigeria> accessed 26 September 2023.

13. REPORTS

Council of Europe, 'Manual on Human Rights and the Environment (3rd edition)' (Council of Europe, February 2022), 7-8, <https://rm.coe.int/manual-environment-3rd-edition/1680a56197> accessed 26 September 2023.

De Schutter O, Ramasastry A, Taylor MB and others, 'Human Rights Due Diligence: The Role of States' (2012). <https://en.frankbold.org/sites/default/files/publikace/human_rights_due_diligence-the_role_of_states.pdf> accessed 28 September 2023.

ECCJ, 'Suing Goliath' (*ECCJ*, September 2021) p 46 <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf> accessed 30 September 2023

Griffin P 'Carbon Majors Report of 2017' (Carbon Disclosure Project, www.cdp.net, July 2017) CDP. <https://cdn.cdp.net/cdp-

production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772> Accessed 25 September 2023

Intergovernmental Panel on Climate Change. 'Climate Change 2023: Synthesis Report - Summary for Policymakers.' In H. Lee & J. Romero (Eds.), *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (p. 7). https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf accessed 25 September 2023.

IPCC, *Climate Change 2022: Mitigation of Climate Change*, Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p 1377 <https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf> accessed 30 September 2023.

National Contact Point Activity' (Oecd.org 2021) 3 <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.htm>

OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on

Rivkin DV, Rowe SJ, Enix-Ross D and others 'UN Guiding Principles on Business and Human Rights at 10' (Debevoise & Plimpton LLP, 6 July 2021) <https://www.debevoise.com/insights/publications/2021/07/un-guiding-principles> accessed 28 September 2023.

Sato M, Gostlow G, Higham C and others, 'Impacts of climate litigation on firm value' (Grantham Research Institute on Climate Change and the Environment, May 2023), Working Paper No. 397, ISSN 2515-5717) p 1 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf> accessed 30 September 2023.

Savaresi A and McVey M, 'Human Rights Abuses by Fossil Fuel Companies' (350.org, 7 February 2020) <https://350.org/press-release/climate-crisis-is-aggravating-human-rights-violations-caused-by-the-fossil-fuel-industry-alerts-350-org-report/> accessed 26 September 2023

Setzer J and Higham C, 'Global trends in climate change litigation: 2021 snapshot.' London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/ accessed 20 September 2023.

Setzer J and Higham C, 'Global Trends in Climate Change Litigation: 2023 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, June 2023) <lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf> accessed 26 September 2023.

WaterLex, 'CLIMATE CHANGE AND HEALTH: The Role of National Human Rights Institutions, National Accountability Mechanisms'

<https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Impact/Waterlex.pdf> accessed 29 September 2023.

14. OTHER SOURCES

'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights', <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 27 September 2023.

'National Action Plan on Business and Human Rights 2017-2022.' English translation available from: <https://www.narodniportal.cz/narodni-akcni-plan-pro-byznys-a-lidska-prava-na-obdobi-2017-2022/> accessed 28 September 2023.

Burger M, Wentz J and Horton R, 'THE LAW AND SCIENCE OF CLIMATE CHANGE ATTRIBUTION: EXECUTIVE SUMMARY' < https://climate.law.columbia.edu/sites/default/files/content/docs/Executive%20Summary.Law%20and%20Science%20of%20Climate%20Change%20Attribution.pdf> accessed 30 September 2023.

European Coalition for Corporate Justice, 'EU model legislation on corporate responsibility to respect human rights and the environment' (Corporatejustice.org, Legal Brief, 26 February 2020) <https://corporatejustice.org/publications/eu-model-legislation-on-corporate-responsibility-to-respect-human-rights-and-the-environment/> accessed 28 September 2023.

ILO, MNE Declaration (1977), <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm> accessed 30 September 2023.

Mahiou A, 'DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER' (United Nations Audiovisual Library of International Law 2011) <https://legal.un.org/avl/ha/ga_3201/ga_3201.html> accessed 26 September 2023.

OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (Oecd.org 2018) <https://www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm> accessed 28 September 2023.

OECD, OECD Guidelines for Multinational Enterprises (1976) <https://www.oecd.org/els/emp/guidelinesformultinationalenterprises.htm> accessed 30 September 2023.

15. THESES

Bobák M, 'The Horizontal Effect of the Right to a Healthy Environment' (Diploma Thesis, Faculty of Law of Masaryk University 2012).

Abstract

Subject of this diploma thesis is the accountability of largest private green-house gas emitters, mainly fossil fuel corporations (so called "carbon majors") and in particular their relationship with human rights law. Strategic climate litigation is on a rise and private emitters are increasingly targeted by the litigants. While human rights are widely used in climate change litigation against governments and state authorities, their role in existing and potential climate lawsuits targeted at private parties remains uncertain. The goal of the thesis is to enlighten this topic analysing potential grounds for corporate climate liability and recent case-law.

Firstly, impact of corporations on climate system (their "share" of GHG emissions) is presented in contrast to their peripheral role in the international climate governance and law. Climate change as a human rights issue is briefly examined in the second part focusing on human rights abuses of fossil fuel corporations, including "case studies" of human rights impacts of corporations Shell, Total and Texaco/Chevron in countries of the Global South.

Third part deals with various sources of potential climate change liability of corporations and role human rights law might play. Concepts of Corporate Social Responsibility and Business and Human Rights are presented as a basis for international soft law instruments and human rights due diligence national legislation. Leaving the human rights lenses, the part ends with an overview of other potential legal sources and stresses importance of private (tort) law.

In the fourth part, major climate lawsuits are analysed considering the findings of previous part. Firstly, definition of strategic climate litigation is discussed, as well as the key on selection of (mainly) European jurisdictions. Then, cases *Milieudefensie v Shell* and *Carbon Majors Inquiry* are dealt with, where international soft law plays an important role, followed by the French cases brought after the adoption of the French mandatory human rights due diligence law. Other recent cases (notably the German *Lliuya v RWE AG*) based on tort law are described afterwards.

Fifth part summarises overall trends in the corporate climate litigation field in the light of previous two parts. Source of potential accountability is revisited stressing the potential of private law instruments, following discussion on prospects of corporate climate litigation.

Author concludes that while human rights discourse has helped to develop pressure to hold corporations accountable for their human rights harms related to climate change, corporate climate litigation can be successful using private law instruments on their own. Human rights instruments can help overcoming some issues corporate climate litigation is facing, like causality or extending the scope of emission accountable. Moreover, human rights lenses help to fulfil the strategic purpose of the litigation. Author in the end identifies various topics for further research: relation of private law to climate change issues, role of Global South and global inequalities, and the urge to redefine private and corporate law to reflect crises of the Anthropocene.

Key words: Climate law, Climate Change, Climate Change Litigation, Climate Lawsuit, Climate Change Liability, Business and Human Rights, Corporate Responsibility

Abstrakt

Předmětem této diplomové práce je odpovědnost největších soukromých emitentů skleníkových plynů, především fosilních korporací (tzv. „carbon majors"), a zejména její vztah k lidským právům. Strategické klimatické žaloby jsou na vzestupu a soukromí znečišťovatelé jsou stále častěji jejich terčem. Zatímco lidská práva jsou široce využívána v klimatických žalobách proti vládám a státním orgánům, jejich role v současných a potenciálních klimatických soudních sporech zaměřených na soukromé subjekty zůstává nejistá. Cílem této práce je osvětlit toto téma analyzováním potenciálních zdrojů odpovědnosti podniků v oblasti klimatu a nedávné judikatury.

Nejprve je představen vliv korporací na klimatický systém (jejich „podíl" na emisích skleníkových plynů) v kontrastu s jejich okrajovou rolí v mezinárodní správě („global governance") a právu v oblasti klimatu. Změna klimatu jako otázka lidských práv je stručně zkoumána v druhé části, která se zaměřuje na porušování lidských práv ze strany korporací využívajících fosilní paliva, včetně „případových studií" lidskoprávních dopadů korporací Shell, Total a Texaco/Chevron v zemích globálního Jihu.

Třetí část se zabývá různými zdroji potenciální odpovědnosti korporací v souvislosti se změnou klimatu a úlohou, kterou by mohla hrát lidská práva. Koncepty „společenské odpovědnosti korporací" a „byznys a lidská práva" jsou představeny jako základ pro mezinárodní nástroje soft law a vnitrostátní právní předpisy v oblasti náležité péče o lidská práva („human rights due diligence"). Část uzavírá přehled právních zdrojů mimo lidská práva, který zdůrazňuje význam soukromého (deliktního) práva.

Ve čtvrté části jsou analyzovány hlavní klimatické žaloby s ohledem na zjištění z předchozí části. Nejprve je diskutována definice strategických klimatických žalob a klíč k výběru (především) evropských případů. Poté část pojednává o případech *Milieudefensie v Shell* a *Carbon Majors Inquiry*, kde hraje důležitou roli mezinárodní soft law, a následně francouzské případy zahájené na základě francouzského zákona o povinné péči v oblasti lidských práv. Poté jsou popsány další nedávné případy (zejména německý případ *Lliuya v RWE AG*) založené na deliktním právu civilním.

Pátá část shrnuje celkové trendy v oblasti klimatických žalob proti korporacím ve světle předchozích dvou částí. Po diskusi o perspektivách klimatických žalob proti korporacím se práce vrací k debatě o právním zdroji potenciální odpovědnosti s důrazem na potenciál soukromoprávních nástrojů.

Autor dochází k závěru, že ačkoli diskurz o lidských právech pomohl vyvinout tlak na to, aby se korporace zodpovídaly za poškozování lidských práv v souvislosti se změnou klimatu, klimatické žaloby mohou být úspěšné i s využitím soukromoprávních nástrojů bez ohledu na lidská práva. Lidskoprávní nástroje však mohou pomoci překonat některé problémy, s nimiž se korporátní klimatické žaloby potýkají, jako je příčinná souvislost a rozsah odpovědnosti za emise. Lidskoprávní perspektiva navíc pomáhá naplnit strategický účel soudních sporů. Autor v závěru vymezuje řadu témat pro další výzkum: vztah soukromého práva k otázkám změny klimatu obecně, role globálního Jihu a globálních nerovností a nutnost nově definovat soukromé a korporátní právo tak, aby odráželo krize antropocénu.

Klíčová slova: klimatické právo, klimatická změna, klimatická litigace, klimatická žaloba, odpovědnost za změnu klimatu, byznys a lidská práva, odpovědnost korporací