REIMAGINING RESPONSIBILITY: HOW HUMAN RIGHTS DUE DILIGENCE PRACTICES COULD INFORM JUDICIAL RESPONSES TO CLIMATE ACCOUNTABILITY LITIGATION

by

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Abstract

Climate Change has been described as the greatest human rights issue of our time. As communities around the world struggle to adapt to life in a warming world, a growing movement has started to call for those who have contributed most to the climate problem – a small handful of major fossil fuel and cement companies now known as the Carbon Majors – to be held responsible for their "fair share" of the costs of climate adaptation. This movement has already resulted in litigation being brought against fossil fuel producers in common law courts. To date, these actions have been unsuccessful. However, I argue that the new norms around corporate responsibility contained in the UN Guiding Principles on Business and Human Rights (UNGPs) could help plaintiffs to change that outcome.

Relying on rights-based theories of tort law, I argue that the norms in the UNGPs could help plaintiffs to establish the existence of a duty of care on the part of the Carbon Majors. After reviewing close to 200 corporate documents and statements, I conclude that the Carbon Majors' public statements suggest a widespread acceptance of the responsibility to respect human rights contained in the UNGPs, and a widespread acceptance of the serious risks posed by climate change. A number of recent cases have seen common law courts demonstrate a new willingness to hold corporate actors accountable to the standards they claim to uphold in their corporate social responsibility reports. Relying on these recent precedents, plaintiffs could rely on the evidence reviewed for this thesis to establish that Carbon Majors have assumed a responsibility to prevent, mitigate, or remediate impacts to their human rights caused by climate change.

Lay Summary

Climate change, which is caused by human-caused emissions of greenhouse gases into the atmosphere, poses a serious threat to the lives and livelihoods of people around the world. Evidence suggests that just a handful of big companies have been responsible for the vast majority of human-caused greenhouse gas emissions since the industrial revolution. Recent years have seen a number of legal cases in which people impacted by climate change have argued that these companies have a legal responsibility to pay their fair share of the costs associated with these impacts. In this thesis, I argue that these individuals could strengthen their cases by relying on international human rights law to establish a legal duty of care on the part of these companies. I also examine close to 200 corporate documents produced by the companies themselves which support the existence of such a duty of care.

Preface

This thesis is original, unpublished, independent work by the author, Catherine Higham.

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List of Abbreviations

BHRRC	Business and Human Rights Resource Centre
GHG	Greenhouse Gas
HRDD	Human Rights Due Diligence
IPCC	Intergovernmental Panel on Climate Change
PCHR	Philippines Commission on Human Rights
UNFCCC	UN Framework Convention on Climate Change
UNGPs	UN Guiding Principles on Business and Human Rights
WBCSD	World Business Council for Sustainable Development

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Chapter 1: Introduction

1.1 Climate accountability and the Carbon Majors

When I first arrived in Vancouver in the late summer of 2017 to begin work on this thesis, I was shocked by the thick haze of smog that covered the city for days at a time. The smog had blown over from forest fires in British Columbia's interior, which was experiencing the worst fire season on record at that time.[1] The 2017 fires burned over 1.2 million hectares of forest, displaced 65,000 British Columbians from their homes, and cost the province more than $564 million.[2] Experts confirmed that the scale of the devastation was in large part attributable to changes in climate, caused by anthropogenic greenhouse gas (GHG) emissions.[3]

These fires are just one example of the increasingly devastating impacts of climate change that are being felt by communities around the world. But while the ten-day air warning advisory in Metro Vancouver had a marked impact on the lives of the city's residents, the impacts of climate change are proving to be most devastating and costly to those living in less affluent communities. As a UN report issued in 2016 notes: "When hit by climate hazards, people afflicted by poverty,

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[1] 2018 has since broken the 2017 record as the worst forest fire season on record, see Bethany Lindsay, "2018 now worst fire season on record as B.C. extends state of emergency", *CBC* (29 August 2018), online < https://www.cbc.ca/news/canada/british-columbia/state-emergency-bc-wildfires-1.4803546> (*last accessed 30 August 2018*)

[2] Estefania Duran, "B.C. Year in Review: Wildfires Devastate the Province Like Never Before", *Global News* (25 December 2017), online <https://globalnews.ca/news/3921710/b-c-year-in-review-2017-wildfires/> (*last accessed 13 July 2018*)

[3] Mark Hume, "Forest fires: Climate Change's New Normal", *The Globe and Mail* (12 May 2018), online <https://www.theglobeandmail.com/news/british-columbia/forest-fires-climate-changes-new-normal/article19793117/ > (*last accessed 13 July 2018*)

marginalization and social exclusion suffer great losses in terms of lives and livelihoods."[4] Existing socio-economic inequalities affect communities' ability to adapt to life in a changing climate. Those who have contributed least to the causes of climate change will suffer the most from its effects.

As communities around the world struggle to cover the costs of adapting to life in a warming world, a growing movement has begun calling for those who have contributed most to the climate problem – major fossil fuel and cement companies – to be held responsible for their "fair share" of those costs.[5] This movement is premised in part on scientific studies pinpointing what that "fair share" may be. In 2014, scientist Richard Heede published ground-breaking research demonstrating that the vast majority of anthropogenic emissions of GHGs between 1854-2010 can be traced to around 90 individual companies, including around 50 investor-owned companies.[6] These companies are now collectively known as the Carbon Majors.

As Ekwurzel et al noted in more recent research, more than half of the emissions traced to the Carbon Majors have occurred since 1986, "the period in which the climate risks of fossil fuel

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[4] Department of Economic and Social Affairs, *World Economic and Social Survey 2016: Climate Change Resilience - An Opportunity for Reducing Inequalities*, UNDESA, UN Doc E/2016/50/Rev.1, online <https://wess.un.org/wp-content/uploads/2016/06/WESS_2016_Report.pdf> at vii (*last accessed 5 October 2018*)

[5] Letter from Ken Williams, Mayor of the District of the Highlands to CEO of Chevron (30 June 2017), link provided by West Coast Environmental Law (website), online <https://www.wcel.org/sites/default/files/downloadable_files/06_07_-_highlandslettertooilcompanies-chevron.pdf> (*last accessed 13 July 2018*)

[6] Heede, R. "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010" (2014) 122:1 Clim. Change 229.

combustion was well established."[7] Shue has argued that by knowingly continuing to actively market products that were harmful to society at large rather than moving to eliminate that harm "as rapidly as possible", these companies have "now incurred a (positive, special, and backward-looking) responsibility to assist in dealing with the disruptions for which their products are the source by financing adaptation and participating in compensation for damage and loss in proportion to their knowing contribution to the disruptions."[8] In the absence of active efforts by the Carbon Majors to meet this responsibility, individuals and communities are taking a growing number of cases to the courts to try and hold these corporations accountable.[9]

These individuals and communities, who I will refer to as climate accountability plaintiffs, face an uphill struggle. As Kysar has noted, "[a]t each stage of the traditional tort analysis—duty, breach, causation, and harm—the climate change plaintiff finds herself bumping up against doctrines that are premised on a classical liberal worldview in which threats such as global climate change simply do not register."[10] But as the cost of adapting to life in a changing climate continues to increase, so does the need for new approaches to the questions of responsibility that these lawsuits raise.

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[7] Ekwurzel et al. "The rise in global atmospheric CO2, surface temperature and sea level from emissions traced to major carbon producers*"* (2017) 144:4 Clim. Change 579 at 587

[8] Henry Shue, "Responsible for What? Carbon Producer CO2 Emissions and the Energy Transition" (2017) 144:4 Clim. Change 591 at 594

[9] For a list of climate accountability cases brought against corporations in the US see: Sabin Centre for Climate Change Law, "US Climate Change Litigation: Common Law Claims", online: < http://climatecasechart.com/case-category/common-law-claims/> (*last accessed 13 July 2018*). For details of climate accountability cases brought against corporations outside the US see: Sabin Centre for Climate Change Law, "Non-US Climate Change Litigation: Suits Against Corporations, Individuals – Corporations", online: <http://climatecasechart.com/non-us-case-category/corporations/> (*last accessed 13 July 2018*).

[10] Douglas Kysar, "What Climate Change Can Do About Tort Law" (2011) 41:1 EL 1 at 9

Much of the early scholarship on climate torts centered on the issue of causation, which has been described as "the most significant challenge" for climate accountability plaintiffs.[11] As I discuss further in Section 4 of this introduction, however, a number of recent developments have begun to shift the debate on this issue. In light of these developments, this thesis will focus on the primary element in the tort of negligence: establishing a duty of care.[12] As Collins and Mcleod-Kilmurray have noted "most scholars agree that climate harm does not fall within an established duty of care".[13] So, in order to establish a cause of action in negligence, plaintiffs will be required to meet the relatively high bar of establishing the existence of a new duty.

The thesis responds to the dearth of legal analysis on the tort of negligence in the climate context. Many scholars have instead tended to focus on other causes of action, including both public and private nuisance.[14] This may be one reason that careful analysis of a duty of care in the climate context has been relatively "overlooked".[15] I argue, however, that not only is there real scope for climate plaintiffs to be successful in claims brought in negligence but also that negligence – with

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[11] *ibid* at 28; See also: Lynda Collins and Heather Mcleod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Thompson Reuters 2014) at 272; David Grossman, *Tort-Based Climate Litigation*, in Burns and Osofsky, eds, *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge: CUP 2009); Byers, Frank, and Gage, "The Internationalization of Climate Damages Litigation" (2017) 7:2 Wash. J. Envtl. L. & Pol'y 264

[12] The rights arguments discussed here could also be of relevance in determining standards of reasonable conduct in cases brought in nuisance, however a full discussion of the application of such standards to claims in nuisance is beyond the scope of this thesis.

[13] Collins and McLeod-Kilmurray, *supra* at note 11, at 287

[14] Kysar, for example, suggests that public nuisance may "commend itself as the logical cause of action to pursue, since it imports a duty to avoid injurious conduct to rights that are held by the public in common", *supra* at note 10 at 13.

[15] David Hunter and James Salzman, "Negligence in the Air the Duty of Care in Climate Change Litigation" (2007) 155 U. PA. L. REV. 1741, at 1794

its focus on questions of "interpersonal responsibility or interpersonal justice" – may in fact be a prime legal site for rethinking responsibility in a world in which we now know that the impacts of our actions may be felt across the globe.[16]

In this thesis, I argue that combining rights-based theories of tort and new international norms around business and human rights could help climate accountability plaintiffs to establish a duty of care on the part of the Carbon Majors. These new norms are most clearly expressed in the UN Guiding Principles on Business and Human Rights (UNGPs), which require businesses to implement their responsibility to respect human rights through the adoption of human rights due diligence (HRDD) to identify human rights risks to which their activities may contribute.[17] Once human rights risks have been identified, businesses must then ensure that these risks are avoided or mitigated. If risks prove to be unavoidable, then businesses must actively cooperate in providing a remedy.[18] There is still much scholarly debate about the role that the responsibility to respect human rights may play in establishing common law duties of care.[19] But I argue that there are strong grounds to suggest that this responsibility and the human rights policies companies adopt to implement it could be used to bring human rights arguments to the fore in tort cases. Adopting such a human rights-based approach would allow climate tort plaintiffs to unite the issue of corporate responsibility for climate change with the growing body of law and literature framing

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[16] Andrew Robertson, "On the Function of the Law of Negligence", (2013) 33:1 Oxf. J. Leg. Stud. 31 at 35

[17] John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc. A/HRC/17/31 ("the UNGPs")

[18] *ibid* at Principle 22

[19] See Doug Cassel, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" (2016) 1:2 BHRJ at 179; Cf Cees van Dam and Filip Gregor "Corporate responsibility to respect human rights vis-à-vis legal duty of care" in Juan José Álvarez Rubio and Katerina Yiannibas (eds.) *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (London: Routledge 2017)

climate change as a human rights issue — a framing that has already contributed to successful outcomes for the climate movement when used in lawsuits against governments.[20]

After making arguments for a rights-based duty of care in the climate context, I examine how the Carbon Majors' own statements support the existence of this duty. I demonstrate that an overwhelming majority (72%) of the Carbon Majors publicly recognize the responsibility to respect human rights. A similar majority (70%) also publicly recognize the existence of physical risks associated with anthropogenic climate change. The human rights impacts associated with these physical risks have been described as "the greatest human rights challenge of our time".[21] So far, however, the majority of the Carbon Majors have failed to connect these two issues and incorporate climate related human rights risks into their HRDD processes.[22] But several companies have developed HRDD processes that take other forms of environmental rights risk into account. I argue that by doing so they have helped to create a reasonable expectation that those HRDD processes should also be extended to climate change.

In the remainder of this introduction, I introduce the general test for a duty of care before providing a brief discussion of recent developments regarding the issue of causation in the climate context. Although causation will not be the focus of this thesis, it is nonetheless closely linked to the issues

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[20] See Harri Osofsky & Jacqueline Peel, "A Rights Turn in Climate Change Litigation?", (2017) 7:1 TEL 37

[21] Quote attributed to Mary Robinson, Former UN High Commissioner for Human Rights, in Office of the High Commissioner for Human Rights, "Understanding Human Rights and Climate Change", (2015) Submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change at 6, online at <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (*last accessed August 6, 2018*)

[22] As I will discuss further in Chapter 3 Section 3.5.3, one company, Heidelberg Cement, does incorporate climate issues into its Human Rights policy.

of foreseeability and proximity that inform the common law duty of care. A basic understanding of the current debate around causation in the climate context is therefore essential to the central issue of this thesis. I also explain why, given the many legal avenues available for addressing the climate crisis, I have chosen to focus on tort law. The second chapter of this thesis then establishes that there is a natural fit between rights-based theories of tort law and international human rights norms that bolsters the claims of climate accountability plaintiffs. In the third chapter I explain the role played by corporate actors and existing corporate practice in the recursive process of international norm development.[23] I then conduct an analysis of close to 200 documents produced by the Carbon Majors to understand what current corporate practice around the responsibility to respect human rights in the climate context looks like. The fourth chapter analyzes how the findings of this study reinforce the arguments made in the second chapter. I conclude that the documents reviewed provide sufficient evidence to establish a new duty of care. Through actively engaging with these issues the Carbon Majors can place themselves at the forefront of developing practices to discharge that duty, avoiding potential court-imposed-liabilities, and demonstrating a true commitment to socially responsible business.

1.2 A duty to avoid climate related human rights harms?

In order to establish a duty of care on the part of the Carbon Majors, the plaintiffs will have to persuade a court that three key elements of a duty of care are present: (i) foreseeability of harm, (ii) proximity between the plaintiff and the defendant and (iii) the absence of policy reasons for

[23] See Terrence C. Halliday and Bruce G. Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes", (2007) 112:4 AJS 1135 at 1138

refusing to recognize a legal duty. Although the precise test for a novel duty of care varies between common law jurisdictions, these central elements remain relevant to the way that courts currently approach the analysis of new duties in practice.

One of the simplest expressions of these key concepts can be found in the UK case of *Anns v Merton London Borough Council*, which, although no longer good law in the UK, nonetheless provides a useful starting point for understanding these issues.[24] Indeed, the simplicity of the test is perhaps one reason why it remains the law in Canada, where it was incorporated into Canadian law through the Supreme Court case of *Cooper v Hobart.*[25] The *Anns/ Cooper* test identifies a two-stage test for determining a novel duty of care. At the first stage, two questions must be considered. Firstly, was the damage complained of "a reasonably foreseeable consequence of the defendant's act"? Secondly, if the harm was foreseeable, is there a sufficiently proximate relationship between the parties that the imposition of a duty is justified? If both these elements of the first stage are met, then the court should move on to the second stage – that is, it must determine whether there are any policy factors that might prevent the imposition of a duty.[26]

The simplicity of the analytical framework provided by *Anns/Cooper* can be traced to a dissatisfaction with the piecemeal way that duties of care had hitherto developed.[27] The decision in *Anns* represented an attempt by Lord Wilberforce to identify a single unified principle for

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[24] *Anns v. Merton London Borough Council*, [1977] UKHL 4, [1978] AC 728

[25] *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 SCR 537

[26] *ibid* at [30]

[27] Robert Martyn, "Categories of Negligence and Duties of Care: Caparo in the House of Lords", (1990) 53:6 Modern L. Rev. 824-828

determining a duty of care.[28] In the late 1980s, however, concerns that this search for a unified principle had led to the overly broad application of new duties of care led the UK House of Lords to reconsider the issue in the case of *Caparo v Dickman.*[29] *Caparo* is often taken to have replaced the *Anns* test with a so-called "three-stage test" for a duty of care, requiring judges to make a separate analysis of questions of foreseeability and proximity before finally moving on to determine whether the imposition of a duty would be "fair, just, and reasonable".[30] Although these elements from the *Caparo* judgement are often formulated as a "test", the House of Lords in *Caparo* in fact suggested that no single unified test would ever be sufficient for establishing a duty.[31] Instead, a number of relevant factors would need to be considered in each case and the law should be extended incrementally.[32] In practice, however, the factors of foreseeability, proximity, and policy raised in *Anns* remain among the "relevant factors" most frequently considered in practice.[33] As such, they continue provide a useful framework for considering the duty of care in climate accountability cases.

In this thesis, I suggest that arguments grounded in the business responsibility to respect human rights could assist climate accountability plaintiffs in satisfying both elements of the *Anns/ Cooper* test. Firstly, it could help satisfy the tests for foreseeability and proximity, which are both

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[28] *ibid*

[29] *Caparo Industries v Dickman* [1990] 2 AC 605; See also Martyn, *supra* at note 27 at 824

[30] Vivienne Harpwood has noted that "[a]ttempts to reformulate the criteria by developing the three-stage test mask the inevitable problem of patrolling the boundaries of liability and attempting to adapt the law to changing circumstances." See Vivienne Harpwood, *Modern Tort Law* (7th ed.) (Oxford: Routledge 2008) at 30

[31] Martyn, *supra* at note 27 at 285

[32] *ibid.*

[33] See Harpwood, *supra* at note 30

concerned with the existence of a relevant relationship of responsibility between the parties. The evidence reviewed for this thesis demonstrates that the majority of the Carbon Majors now accept that climate change poses a serious threat. I argue that this acceptance triggers a responsibility to conduct HRDD to identify communities and individuals whose rights may be most seriously impacted by that threat, and to prevent, mitigate, or remediate climate-related human rights impacts. I also argue that corporate commitments to the responsibility to respect human rights and to conduct HRDD in respect of environmental human rights harms may contribute to establishing a relationship of "proximity" between the parties. This may help plaintiffs to show that there has been an interpersonal injustice committed against them by the defendants for which the law should concern itself with providing a remedy.[34] Secondly, I argue that human rights arguments may be helpful in persuading judges to take a more nuanced approach to assessing responsibility. This could help to ensure that less weight is given to economic policy considerations which might be seen as mitigating against the imposition of a novel duty of care. Instead this could help to emphasize the fundamental questions of justice with which climate accountability cases confront us.

1.2.1 Foreseeability

As Hunter and Salzman have argued, the question of foreseeability in tort law concerns not only whether a harm was foreseeable at all, but also whether a defendant ought to have foreseen that a specific type of harm to specific groups of people might arise as a result of their conduct.[35] They have described this question as concerning whether the parties were in the "zone of foreseeable

[34] Robertson, *supra* at note 16

[35] Hunter and Salzmann, *supra* at note 15 at 1748

risk".[36] In this thesis, I argue that the responsibility to pro-actively identify actual and potential human rights impacts imposed by the UNGPs should bring at least those climate accountability plaintiffs whose human rights have been most seriously impacted by the Carbon Majors' ongoing contributions to global GHG emissions within this zone of foreseeable risk.

1.2.2 Proximity

There is much scholarly debate about the proper role of "proximity" in the analysis of a duty in tort law, its relationship to foreseeability, and indeed, whether it should play any role at all.[37] Nonetheless, the concept continues to be regularly employed by the courts when it comes to determining the nature of the relationship between the parties in a negligence suit. Judges often refer to proximity analysis when assessing whether the plaintiffs fall within the class of people "who ought to have been within the defendant's contemplation" at the time of the allegedly tortious activity.[38] In this thesis, I argue that the responsibility to conduct HRDD, which requires companies to identify communities or individuals whose human rights may be affected by their activities, brings the Carbon Majors into a relationship of proximity with climate accountability plaintiffs.[39] Accepting the responsibility to respect human rights entails accepting that those who have suffered or will suffer human rights impacts as a result of a company's activities "ought" to have been within the contemplation of that company.

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[36] *ibid.*

[37] Weinrib has observed that "formulating the limiting conditions that satisfy the requirement of proximity in a principled way has turned out to be troublesome." He argues that the idea lacks coherence and introduces an unnecessary element of artificiality into the analysis of correlative rights and duties that should form the basis of a duty of care. See Ernest J. Weinrib, *Corrective Justice*, (Oxford: OUP 2012) at 58; See also Martyn, *supra* at note 27

[38] Weinrib, *supra* at note 37 at 45

[39] See Principles 15 and 18 of the UNGPs, *supra* at note 17

There have been a number of recent cases in common law jurisdictions including both Canada and the United Kingdom in which a corporation's corporate social responsibility (CSR), sustainability, and human rights commitments have played a central role in judicial analysis regarding whether the corporation owed a duty to a group of plaintiffs affected by its operations or those of its subsidiaries.[40] Increasingly, judges are beginning to accept arguments that the evolving societal norms that have resulted in corporations adopting human rights policies are relevant in answering the question of to whom a legal duty of care is owed. In light of this trend, this thesis will explore the statements that the Carbon Majors themselves have made about their responsibility to respect human rights and about the need to manage the foreseeable risks posed by climate change.[41] It will then consider how these may be relevant to questions of interpersonal responsibility and legal liability raised by corporate contributions to climate change.

1.2.3 Policy

In addition to their relevance to establishing a relevant relationship between the parties, I will also argue that incorporating human rights arguments into climate tort cases will facilitate establishing the final stage of the *Anns/ Cooper* test: the absence of policy concerns that would prevent the

[40] See for example *Lungowe & Ors v Vedanta Resources Plc*, [2017] EWCA Civ 1528 ("*Lungowe*"); *Choc v Hudbay Minerals Inc*., 2013 ONSC 1414 (CanLII) ("*Hudbay*"). These cases will be discussed further in Chapter 2.
[41] It should be noted that even where no express commitment has been made by a company accepting the responsibility to respect, a general consensus that respect for human rights is pre-requisite for global companies to continue to do business may come to mean that the standards set out in the UNGPS are standards to which companies are legally obligated to adhere. For discussion of the potential for international human rights norms to be incorporated into the common law, see Doug Cassel, *supra* at note 19 at 195

court from imposing a new duty of care.[42] There is much controversy about the proper role of "policy" in judicial decision making, and indeed, much controversy over what the term policy actually refers to.[43] However, there is no doubt that when considering whether to establish a new duty of care judges are often confronted by novel questions which cannot be answered simply by recourse to previous judgments, but which must involve some discussion of both policy and principle.[44] I argue that by relying on rights-based arguments as well as the Carbon Majors' own acceptance that they have a responsibility to respect rights, plaintiffs could emphasize the questions of legal principle raised by climate accountability cases. This would allow them to shift the focus from the disputed territory of economic "policy", which has in the past been a factor in judicial rejection of climate accountability suits, to the more fundamental questions of interpersonal justice and responsibility raised by these cases.[45]

1.3 A note on causation

In this section, I discuss recent developments in the debate around whether it is possible to establish a legally relevant causal connection between the Carbon Majors' activities and the harms suffered by climate accountability plaintiffs. I argue that these developments suggest that courts may now be willing to find that such a causal relationship exists. Since the question of causation is

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[42] The analysis applied in this thesis to questions of "policy" could also be applied to the questions of "reasonableness" raised in the analysis in *Caparo*.

[43] See Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method,* The Hamlyn Lectures: Fifty-Fifth Series, (London: Sweet & Maxwell 2004) at 84

[44] *Ibid.*

[45] ibid. Kirby argues that legal principle is "allied" to legal policy and is the "distilled product of earlier considerations of authority and policy", as such it is preferable for judges to rely on this body of authority (which includes principles derived from international human rights law) when possible.

fundamentally linked to the questions of foreseeability and proximity discussed above, these developments may help climate accountability plaintiffs to achieve success in arguing for the existence of a duty of care.

Writing in 2009 Grossman noted that while scientific studies showing the connection between climate change and impacts such as extreme weather events or melting permafrost could establish a generic causal link between climate change and harms suffered by the plaintiffs, proving the specific causation, i.e. establishing that the identified tort feasor caused the specific event or harm, required for most tort cases was more difficult.[46] While no court has yet determined the issue of causation at the merits stage of a climate accountability case, *obiter* comments from the US federal courts in some early cases certainly suggest that the courts might find arguments like those advanced by Grossman to be persuasive. The case of *Kivalina v ExxonMobil* provides one early example of such reasoning.[47] In 2008, the Native Village of Kivalina and City of Kivalina filed a suit in nuisance against a number of large fossil fuel companies seeking monetary damages in compensation for harms caused by climate change. The case was dismissed at first instance on grounds of non-justiciability and lack of standing. In its judgment, however, the federal district court noted that "[i]n view of the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings makes clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person,

[46] Grossman, *supra* at note 11

[47] *Native Vill. of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863 (N.D. Cal. 2009) ("*Kivalina*")

entity, group at any particular point in time."[48] The court noted that if the case had proceeded to the merits it was highly unlikely that the injuries suffered by the plaintiff could have been said to be traceable to the defendants.

Nearly a decade later, however, in light of the research by Heede and Ekwurzel discussed above, the debate has moved on. In November 2015 Saúl Luciano Lliuya, a farmer from the Andean city of Huaraz, Peru, brought a case against the German coal company RWE in the District Court of Essen, Germany relying on Heede's research.[49] Lliuya alleged that as 0.5% of global CO2 emissions were attributable to RWE, the company should be held liable for 0.5% of the costs of protecting his land in Huaraz from the risks caused by climate change, in particular the risk of flooding from a nearby glacial lake. The case was dismissed at first instance, in large part because of a lack of 'but-for' causation: the court held that "the contribution of individual greenhouse gas emitters to climate change is so small that any single emitter, even a major one such as the defendant, does not substantially increase the effects of climate change."[50] The case, however, was subsequently appealed to the Higher Regional Court Hamm. On November 30, 2017 the Higher Regional Court overturned the lower court's ruling on causation, permitting the case to proceed to the merits. As Lliuya's lawyer noted this case is "writing legal history".[51] It is the first time a court

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[48] *Ibid.* at 20

[49] *Lliuya v. RWE AG*, Case No. 2 O 285/15 Essen Regional Court

[50] *See Unofficial English Translation of Decision Pronounced by Essen District Court,* (December 15th, 2016), Climate Litigation Databases, *supra* at note 9, at 7, online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf> (*last accessed October 5th, 2018*)

[51] Roda Verheyen, quoted in "Historic breakthrough with global impact in "climate lawsuit"" Press release, (2017) online: Germanwatch <https://germanwatch.org/en/14795> (*last accessed October 5th, 2018*)

has allowed the possibility that "[m]ajor emitters of greenhouse gases can be held liable for protective measures against climate damages."[52] A number of cases citing Heede's research have also been brought in the US and elsewhere.[53] While it is not yet clear whether the courts in these cases will decide to follow the lead of the German courts in the RWE case, it is possible that we have begun to turn a corner on the issue of causation in climate accountability cases. For this reason scholarship on other elements of climate torts is now all the more necessary.

1.4 Why focus on tort?

Tort law is far from being the only available legal response to climate change. Other regulatory responses including the imposition of carbon taxes, the inclusion of climate tests in environmental assessment processes, and the incorporation of emissions reductions targets into legislation all have an important role to play in ensuring the transition to a sustainable low carbon future. In fact, as Lord et al. argued in 2012, "few would dispute that regulation is a more appropriate response to climate change than litigation." Unfortunately, however, there remains "a huge gap between what is politically possible to deliver, and what science tells us is necessary to avoid significant long-term damage."[54] Six years later, legislative and regulatory solutions continue to fall short.

As Wettstein and Schrempf-Stirling have noted in the broader context of transnational business governance, tort law can be an effective tool to generate "regulatory effects" and contribute to the development of new societal standards in areas where traditional forms of regulation are absent or

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[52] *ibid*

[53] Climate Litigation Databases, *supra* at note 9

[54] Lord et al, eds., *Climate Change Liability: Transnational Law and Practice*, (Cambridge: CUP 2012) at 36

ineffective.[55] Chalifour, Mcleod-Kilmurray, and Collins have also argued that since tort law "does not depend for its enforcement on the political priorities of any given government" it may be a powerful tool in addressing climate issues that require "a level of economic and industrial reorganization that may be daunting to governments".[56] Climate accountability litigation could prove to be an important tool in shifting both legal standards and social narratives around climate change. This in turn may influence the standards of conduct required by governments and international bodies, further strengthening new norms around corporate responsibility in the climate context.

[55] Judith Schrempf-Stirling and Florian Wettstein, "Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies", (2017) 145:3 JBE 545 at 556

[56] Nathalie Chalifour, Heather Mcleod-Kilmurray, and Lynda Collins, "Climate Change: Human Rights and Private Remedies" in Sébastien Duyck, Sébastien Jodoin & Alyssa Johl (eds.), *The Routledge Handbook of Human Rights and Climate Governance* (London: Routledge, 2018) at 381

Chapter 2: Climate rights and climate torts: rights-based arguments for a duty of care in climate accountability cases

2.1 Introduction

This chapter identifies the potential for rights-based arguments to help climate accountability plaintiffs achieve success in the courts. In the next section, I examine the potential for rights-based theories of tort to provide a basis for a principled analysis of the issues of interpersonal responsibility raised by climate accountability cases. Such an analysis may allow both plaintiffs and judges to avoid becoming embroiled in the difficult cost-benefit analyses of climate change that have so far led to inaction by economists and policy-makers.[57] In the third section I briefly examine the emergence of the business responsibility to respect human rights as a new international norm, before providing an overview of the literature discussing the potential for this responsibility to become a binding duty in tort law. Although some of the recent literature suggests that the responsibility to respect human rights, and the obligation to conduct HRDD, will soon crystallize into a hard law duty of care, there are some scholars who see such a development as a more distant prospect.[58] There is also some debate as to whether the new norms around this responsibility are strictly necessary for a finding that a duty of care exists in many of the circumstances in which corporate activity negatively affects the rights of third parties.[59] Some

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[57] See Kysar, *supra* at note 10

[58] van Dam and Gregor have argued that although there are circumstances in which the "similarity" between HRDD and the "duty of care concept in tort law" may mean that "a breach of the corporate responsibility to respect human rights can…amount to a breach of duty of care," in practice there are many "obstacles" that prevent plaintiffs from being able to establish such a duty. They suggest that, at least in the EU, the legislative reform may be required to ensure that victims of human rights abuses are able to recover, see van Dam and Gregor *supra* at note 19 at 122

[59] Cf Cees van Dam, "Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights" (2011) 2 JETL 221

scholars have also argued that the UNGPs may add little to existing tort law principles which are inherently concerned with rights protection and the exercise of reasonable care to protect the rights of others. Nevertheless, I argue that the existence of the new norms, and in particular the requirement that corporations should develop and publish policies which set out their commitments to respecting human rights, could provide useful evidence which may support a finding of proximity between the parties. The fact that the UNGPs also make clear that the responsibility to respect human rights and the obligation to conduct HRDD extends not just to a parent company's own operations but also to the activities of its subsidiaries may also assist plaintiffs in overcoming hurdles that have previously posed problems for plaintiffs in transnational tort cases.

Having established the potential for the norms contained in the UNGPs to contribute to establishing corporate duties of care to prevent or address human rights impacts, in the fourth section of this chapter I consider the application of these arguments in the context of climate change. I briefly review the literature framing climate change as a human rights issue, before going on to examine what Osofsky and Peel have identified as a "rights-turn" in recent climate change litigation.[60] Osofsky and Peel have argued, this "rights-turn" has already led to climate litigation against governments meeting with considerable success in the courts. I argue that by emphasising the corporate responsibility to respect human rights in tort cases climate accountability plaintiffs could meet with similar success in litigation against corporations.

[60] Osofsky and Peel, *supra* at note 20

The chapter concludes by offering two main arguments in favour of a rights-based approach to climate accountability cases: firstly, by focusing on climate change's impacts on the rights of the plaintiffs and on questions of interpersonal responsibility and fairness, rather than on instrumentalist economic analyses, climate accountability plaintiffs may be able to persuade judges that tort law is well-equipped to answer the complex questions posed by climate accountability cases. Secondly, relying on the responsibility to conduct HRDD set out in the UNGPs may help climate accountability plaintiffs to meet the test for proximity required to establish a duty of care. Since HRDD requires corporations to make efforts to understand the human rights risks associated with their activities it may also contribute to demonstrating that harm to the plaintiffs "ought" to have been foreseeable. Finally, by introducing human rights arguments into climate litigation against corporations, plaintiffs may be able to capitalise on the success of the "rights-turn" in climate litigation against governments. Human rights arguments help demonstrate the urgency of the threat of climate change and its impact on current and future generations. As such, they are a powerful tool to convince both courts and the public that the business as usual approach to fossil fuel production is no longer tenable.

2.2 Rights and responsibility in torts

Climate torts, and indeed all torts, can be characterized in different ways depending on the theoretical lens being applied. In this section, I argue that deeply rooted rights-based theories of tort provide the best model for understanding the issues at stake in climate accountability cases, and that relying on this model may help climate accountability plaintiffs to meet with success before the courts. Kysar and Weaver have argued that most tort scholars can be said to fit into one

of two broad camps: the corrective justice camp or the instrumentalist camp.[61] In his monograph *Torts and Rights,* Stevens also argues that two separate models of tort law can be seen at work in most common law countries.[62] The first of these – the "loss model" – is premised on the idea that a defendant should be liable for loss caused to the claimant, "unless there is a good reason why not".[63] This model broadly corresponds with the model favoured by Kysar and Weaver's instrumentalist camp, who see tort law as a mechanism for determining who should be forced to bear the costs of a loss associated with a given activity.[64] A key assumption in this model is to assume that activity, particularly if it as an economic activity, will in general contribute to the maximisation of social welfare.[65] The second – the "rights model" – suggests that a tort is "a wrong generated by the breach of a duty owed to someone else," a duty that is based on a corresponding right.[66] As such it is more closely concerned with the moral implications of an activity as it affects the parties directly, rather than with wider utilitarian arguments.

Writing in 2010, Kysar argued that both economists and climate accountability plaintiffs have historically tended to view climate change as a "familiar externality problem", approaching the issue from the perspective of the instrumentalist camp.[67] This approach can be seen in the work of scholars like Hunter and Salzman, who focus their analysis of a potential tort duty in climate

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[61] Douglas Kysar and R. Henry Weaver, "Courting Disaster: Climate Change and the Adjudication of Catastrophe", (2017) Electronic copy available at: https://ssrn.com/abstract=2965084 at 22 (*last accessed October 5th, 2018*)
[62] Robert Stevens, *Torts and Rights*, (Oxford: OUP, 2007)
[63] *Ibid*. at 1
[64] *Ibid*. at 306, see also Kysar and Weaver *supra* at note 61
[65] Cf. Alberto Sanchez-Graells, "Economic Analaysis of Law" in Dawn Watkins and Mandy Burton (eds.) Research Methods in Law (London: Routledge, 2013)
[66] Stevens, supra at note 62 at 1
[67] Kysar, *supra* at note 10 at 9

change cases on the risk-utility analysis proposed by Judge Learned Hand in *United States v Carroll Towing Co.* and on multi-factor balancing tests.[68] But as Kysar has argued this approach has to date been unsuccessful, in large part because it has failed to take into account the paradigm-shifting nature of climate change.[69] Applying "conventional cost-benefit analyses" to climate change has yielded generally unsatisfactory results, because such analyses typically assumed an "empirically unrealistic potential for social, economic, and environmental systems to suffer damage without being critically undermined."[70] Liberal economists, faced with a choice between "reforming the underlying architecture of their discipline" or failing to adequately address the problem of climate change have largely chosen the latter option.[71] Kysar warned that if plaintiffs continued to present tort judges with instrumentalist economic analyses as the starting point for adjudicating climate accountability cases, then those judges might well fall into the same trap. I argue that relying on rights-based theories of tort in climate change cases may be one way for climate accountability plaintiffs to encourage judges to take a different approach.

Stevens favours rights-based theories of torts precisely because they avoid getting into the detailed discussions of policy (economic or otherwise) that can lead to inconsistency between tort judgments. He argues that a rights model is far more coherent. Such a model not only accounts for older forms of tort such as trespass, which are actionable *per se* without the need to prove

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[68] Hunter and Salzman, supra at note 15 at 1756. Hunter and Salzman also observe that both "industry custom" and "overriding policy concerns" could also be of relevance in the analysis of a duty of care in the climate context.
[69] Kysar, *supra* at note 10 at 8
[70] *Ibid.*
[71] *Ibid.* at 10

consequential loss, but also helps to shed light on other controversial areas.[72] For example, the exclusionary rule against recovery for economic loss, not to mention the various exceptions to that rule, appear somewhat arbitrary and hard to explain on the loss-model of tort law.[73] But on the rights-model they become simple: economic losses are not actionable unless they are contingent on the foreseeable infringement of a particular right. On this conception the exclusionary rule ceases to exist. Tort law does not categorically refuse to provide redress for pure economic loss but instead only provides redress for economic loss arising as a result of the infringement of certain underlying rights. As Stevens puts it "On a rights-based model it is not the ocean of no-liability which requires mapping, but the isolated islands of rights."[74]

Canadian tort theorist Ernest J Weinrib, one of the leading proponents of the corrective justice camp, has also rejected dominant loss-based and instrumentalist analyses of tort law. He argues that theories of tort based on corrective justice allow us to see tort law "as a repository of moral reasoning about responsibility for injury rather than as a device for promoting economic goals."[75] His theory is premised on the idea that tort law seeks to remedy an injustice between parties. Rights – which necessitate corresponding duties – are the foundation from which the existence of such an injustice should be determined.[76] For Weinrib, negligence – with its focus on the interpersonal

[72] Stevens, *supra* at note 62 at 21
[73] *Ibid*.
[74] *Ibid*.
[75] Weinrib, *supra* at note 37 at 9
[76] *Ibid*. at 20

relationship between the defendant and the plaintiffs – "provides the paradigmatic example" of these correlative rights and duties at common law.[77]

The major criticism of the interpretative theories of scholars like Stevens and Weinrib has been that they do not reflect the reality of judicial decision-making.[78] But as Robertson has argued, while judges do not necessarily base the entirety of their decisions about whether a duty of care exists on concerns of interpersonal justice, interpersonal justice is nevertheless always a primary or foundational consideration in any tort case.[79] Chalifour et al have also argued that although tort law may has "multiple facets and functions" that may seem unconnected with rights, rights are "an ongoing and significant preoccupation of tort law today".[80] On this basis, the authors go on to argue that tort law's concern with remedies for individual wrongs is "conceptually…consistent with a human rights approach to climate change".[81] By using rights-based arguments to connect the interpersonal disputes in climate accountability cases to the emerging societal norms about responsible business conduct, climate accountability plaintiffs may be better able to persuade tort judges to find in their favour. Through the lens of the corporate responsibility to respect human rights, the Carbon Majors' ongoing contributions to climate change may be seen as a matter of interpersonal justice that fits within the purview of the law of negligence, rather than as a thorny externality problem that is best left to other branches of government to decide.

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[77] *Ibid*.
[78] See Robertson, *supra* at note 16 at
[79] *Ibid*.
[80] Chalifour, Mcleod-Kilmurray, and Collins, *supra* at note 56 at 380
[81] *Ibid* at 381

2.3 Corporate respect for human rights: from responsibility to duty

In the preceding section I argued that adopting rights-based theories of torts could help climate accountability plaintiffs avoid some of the issues that have been encountered by economists and policy-makers attempting to address the issue of climate change. But in order to rely on rights-based theories of torts, climate accountability plaintiffs need to show that they have rights that have been or will be affected by the actions of the defendants. They also need to show that the defendants have a corresponding responsibility to take negative impacts on those rights into account when determining whether to proceed with those actions, and that this responsibility could contribute to establishing the existence of a duty of care. In the remainder of this chapter, I argue that the rights affected by the defendants' contributions to climate change are the plaintiffs' fundamental human rights. The new norms described in the UNGPs provide evidence that the defendants had a responsibility to respect those rights, which could inform arguments around the existence of a binding duty of care. The defendants' failure to carry out this responsibility by conducting adequate HRDD and acting to avoid, mitigate, or remediate climate related human rights harms may result in an actionable breach of such a duty.

2.3.1 Business and human rights: the new norms

As corporations have become increasingly powerful actors in our interconnected and globalised world, there has been considerable scrutiny of their rights and responsibilities under international law. As Muchlinski has argued, multi-national corporations (MNCs) have played a significant role in shaping international legal debates for decades and have often benefited from provisions of

international law tailored to provide them with significant advantages.[82] On the one hand, the rights and interests of MNCs are often protected through binding 'hard-law' legal regimes such as those designed to encourage foreign direct investment. On the other, the corporations themselves are often shielded from corresponding 'hard-law' obligations, instead being subject only to voluntary 'soft-law' regimes designed to ensure corporate responsibility.[83] This state of affairs has been perpetuated by the legal positivist myth that corporations are not proper subjects of international law, which applies only between nation states.[84] Muchlinski argues that the failure of early attempts to impose binding international human rights obligations on multinational corporations – such as the *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Draft Norms")* – can in large part be attributed to the successful exploitation of this myth.[85]

Fortunately, however, these failures were not the end of the story. Although the *Draft Norms* were not adopted, the debate around their creation led to the appointment of John Ruggie as the Secretary General's Special Representative on Business and Human Rights in 2005. During the first three years of his mandate, Ruggie developed a new framework for bringing business and human rights together. Rather than trying to introduce 'hard-law' obligations on corporations equivalent to those imposed on states, Ruggie's framework derives "normative force from

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[82] Peter Muchlinski, *Multinational Enterprises as Actors in International Law: Creating Hard Law Rights and Soft Law Obligations*, in Noortman and Ryngaert eds. *Non-State Actor Dynamics in International Law* (London and New York: Routledge 2010)
[83] *ibid*
[84] Cf. Natasha Affolder, *Non-State Actors*, in Michael Faure (ed.), Elgar Encyclopedia of Environmental Law, Vol III (Cheltenham: Edward Elgar, 2015)
[85] Muchlinski, *supra* at note 82 at 20

recognition of social expectations."[86] The framework centres around three pillars: the state's duty to protect human rights, businesses' responsibility to respect human rights, and the duty on both to provide a remedy to human rights abuses where they do occur.[87] By adopting an approach that he himself has described as "principled pragmatism",[88] Ruggie was able to engage stakeholders from across the board in developing the framework, leading to its endorsement by both national governments and industry. Following the success of the initial "*Protect, Respect, and Remedy" Framework*, Ruggie's mandate was extended for a further three years. He was asked to provide guidance on how to operationalise the framework. The UNGPs were the result.

The UNGPs make it clear that in order to operationalize the responsibility to respect human rights, businesses must do three things: firstly, they must make a public policy commitment to respecting human rights. Secondly, they must perform human rights risk assessments, to determine whether a proposed or ongoing activity may result in human rights harms. Finally, where harms arise or are likely to arise the business must take steps to address those impacts by avoiding, mitigating, or remediating them.[89] Collectively, these steps constitute HRDD. Building on the guidance provided by the UNGPs, the Office of the High Commissioner for Human Rights (OHCHR) has defined HRDD as: "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from,

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[86] John Gerard Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization.* Regulatory Policy Program Working Paper RPP-2015-04. (Cambridge, MA: Mossavar-Rahmani Center for Business and Government, 2015) at 3

[87] John Gerard Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/5

[88] Ruggie, *supra* at note 86

[89] See Principle 15 of the UNGPs, *supra* at note 17

and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."[90] As Mccorqudale et al. have noted this definition clearly situates HRDD "within the tort law language of a reasonable or prudent person," but also leaves key details of what HRDD should look like open to debate.[91] Despite the open-ended nature of these definitions, I argue that key elements of HRDD as it is described in the UNGPs may assist plaintiffs who seek to argue a tort law duty of care should be extended to novel circumstances.

As Regan and Hall have observed, the UNGPs describe the obligation to engage in HRDD in respect of actual and potential human rights impacts as "not binding but not voluntary" and their uncertain status on the border between hard and soft law has led to criticism from some scholars.[92] But others like Muchlinski have argued that these norms have the potential to "develop into a binding legal duty of care under tort law for both management and the corporation".[93] Although some scholars would argue that the norms have not yet developed into such a binding duty, advances towards realising that potential are explored further in the next two sub-sections of this chapter.

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[90] Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide HR/PUB/12/02* at 4, online: <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> (*last accessed October 4th 2018*)
[91] Robert Mccorquodale, Lise Smit, Stuart Neely, and Robin Brooks, "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises," (2017) 2:2 BHRJ 195-224 at 198
[92] Milton C. Regan and Kath Hall, "Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights" (2016) 84 Fordham L. Rev. 2001 at 2001; Cf. van Dam, *supra* at note 59
[93] Peter Muchlinski, "The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World" (2011), 18:2 IGJLS 665-705 at 692;

2.3.2 A "new" duty to respect human rights?

In this section, I discuss recent scholarship that suggests that the obligation to respect human rights could form the basis of a hard law duty of care at common law. Some scholars would dispute whether the responsibility to respect human rights is close to evolving into a hard law duty of care. Others have argued that the UNGPs simply restate existing binding legal standards requiring corporate actors to refrain from activities which may harm others. I argue that in spite of these criticisms, the UNGPs can nonetheless provide clarity about the scope of corporate duties of care to third parties, and about the steps that corporate actors should be expected to take to address actual and potential rights impacts to those third parties. As such, these standards may help plaintiffs seeking to establish new duties of care on the part of corporate actors in respect of human rights harms.

In a recent article from 2016, Cassel has argued that "the time is ripe for the courts to recognize a business duty of care to exercise human rights due diligence."[94] In making this argument, Cassel relies on the overwhelming acceptance of the UNGPs among corporations and governments in common law jurisdictions.[95] He notes that when developing the common law, judges will often turn to widely accepted international norms, particularly those concerning human rights.[96] Although this will not necessarily result in the "instant manufacture" of parallel common law

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[94] Cassel, *supra* at note 19 at 180

[95] *Ibid.* See also World Business Council for Sustainable Development (WBCSD), "Reporting Matters: Striking a Balance Between Disclosure and Engagement" (2017) at 21, online at < https://www.wbcsd.org/Programs/Redefining-Value/External-Disclosure/Reporting-matters/Resources/Reporting-Matters-2017> (*last accessed September 5th, 2018*)

[96] *Ibid.* See further Justice Kirby, *supra* at note 43

norms, there is nevertheless an assumption that the common law will seek ways to reflect international norms where possible. On this basis, Cassel argues that the UNGPs – and the responsibility to conduct HRDD – should be treated as "presumptive common law norms", which could inform judicial analysis at each stage of the test for a duty of care.[97]

Not everyone would agree with Cassel's assertion that the UNGPs should be treated as presumptive common law norms. The commentary to the UNGPs makes clear that the "responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions."[98] Although Cassel is not alone in arguing that common law courts may find the UNGPs a persuasive tool for interpreting the existing provisions of national law, some scholars have suggested that state action may be needed to ensure that these standards are fully integrated into tort law.[99] I argue, however, that even if Cassel has overstated the normative weight that common law courts are likely to attribute to the norms set out in the UNGPs, these norms are nevertheless highly relevant to the interpretation of existing common law standards. As such, they could help climate accountability plaintiffs to meet the test for establishing a duty of care discussed in the introduction to this thesis.

As discussed above, the first limb of the *Anns*/*Cooper* test for a duty of care is likely to involve two key elements: foreseeability and proximity. In Cassel's view, the foreseeability factor "is

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[97] *Ibid* at 200
[98] UNGPs, *supra* at note 17 at 12
[99] See van Dam and Gregor, *supra* at note 19

satisfied by the very concept of a duty of care based on the business responsibility to exercise due diligence to anticipate and mitigate foreseeable human rights risks."[100] While this may be overstating the case, the fact that the UNGPs do require companies to investigate human rights impacts pro-actively could certainly help plaintiffs to establish that such impacts ought to have been foreseen by corporate defendants. The UNGPs suggest that HRDD should identify all persons whose rights may be "closely and directly affected" by the actions of the defendants. Corporate policy commitments to conducting HRDD may therefore create an expectation among such persons that harms to their rights will be identified and addressed.[101] This expectation may be sufficient to establish a relationship of "proximity" between defendants and third parties suffering human rights impacts. Finally, when it comes to questions of policy, Cassel argues that judges have had their work done for them. Since the norms contained in the UNGPs are globally accepted, he suggests that judges "need not reinvent the wheel" by questioning whether other factors may weigh against them.[102] Even if judges are not willing to disregard all other policy factors in favour of these norms, the norms' widespread recognition is nonetheless likely to help plaintiffs to overcome other policy arguments that might previously have prevented the imposition of a duty of care.

The responsibility to respect human rights contained in the UNGPs may also assist plaintiffs in overcoming another hurdle that has often stood in the way of tort plaintiffs alleging human rights

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[100] Cassel, *supra* at note 19 at 199
[101] *Ibid.*
[102] *Ibid* at 200

abuses against major MNCs: the doctrine of separate legal personality. This doctrine acts to insulate a company's owners for liability for the company's actions on the basis that a duly incorporated company becomes an independent legal entity with its own rights and responsibilities.[103] In the past, the doctrine has successfully been used to insulate large MNCs from liability for the actions of their subsidiaries, despite the fact that these MNCs and their shareholders are the ones who ultimately profit from the subsidiary's irresponsible actions.[104]

As I will discuss in the next sub-section of this thesis, in recent years there have been a number of cases in which corporate policies and statements published by parent companies have been used to establish that a parent company may owe a duty of care to individuals affected by the activities of legally separate entities such as subsidiaries. These cases rest on the idea that if the parent company has a degree of power or control over the activities of such legally separate entities, then it may owe a duty of care to exercise that control to prevent harms occurring to third parties affected by the activities of those entities.[105] Whether a duty of care is indeed found to exist will depend on the degree of responsibility assumed by the parent company for the subsidiary's activities, and on whether "considering the likeliness and magnitude of the potential harm suffered by the victims of a human rights violation, the company should have taken measures to prevent the harm from occurring or to mitigate its consequences.".[106] The UNGPs may come to the aid of

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[103] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22

[104] See Katerina Yiannibas and Lucas Roorda, *Human Rights in Buisness: Removal of Barriers to Access to Justice in the European Union* (London: Routledge, 2017) at 2

[105] See van Dam and Gregor, *supra* at note 19; See also the UK case of *Sutrahadar v Natural Environment Research Council* [2006] UKHL 33, in which Lord Hoffman made clear that one of the central questions for establishing the existence of a duty was to determine whether the defendant had a) some responsibility to the plaintiffs and b) some degree of control over the "source of the danger".

[106] van Dam and Gregor, *supra* at note 19 at 122

plaintiffs seeking to establish that the first of these requirements is met. Principle 16 requires businesses to develop a statement of policy for addressing human rights impacts associated with their activities – including those caused by subsidiaries and suppliers - that is commensurate with the size and nature of their operations.[107] By adopting human rights policies that commit to conducting HRDD throughout their operations and supply chains as required by this principle, large MNCs may establish that they have the responsibility required to establish a direct duty of care between them and those affected by a subsidiary's actions.

Some scholars have questioned whether there would really be anything particularly new about a duty of care based on the norms contained in the UNGPs. The Dutch scholar Cees van Dam, writing about tort law's role in ensuring effective remedies for irresponsible corporate conduct, has noted that corporate conduct that violates human rights often has also constituted a tort violation. He argues that tort law has always been "the most important private law enforcer of human rights".[108] He notes that "it is beyond doubt that in tort law [MNCs] are obliged not to infringe (rather, to respect) the citizen's rights to life, physical integrity, health, property and freedom and other rights."[109] As a result, van Dam is critical of the Ruggie framework and the UNGPs, arguing that simply overlap with existing tort obligations and do not necessarily remove the "obstacles" to recovery currently faced by plaintiffs.[110] And indeed, Ruggie himself has appears to agree with this argument – he has stated on a number of occasions that the UNGPs do not create

[107] See Principle 16 of the UNGPs, supra at note 17
[108] Van Dam, *supra* at note 59 at 254
[109] *Ibid*. at 243
[110] Van Dam and Gregor, supra at note 19

new law but instead simply elucidate responsibilities that already existed.[111] If that is the case, and the UNGPs add nothing to existing law, then one might well ask why climate accountability plaintiffs should bother to spend time grappling with the novel legal arguments discussed in this thesis. If van Dam is right and there was already a pre-existing obligation on fossil fuel corporations to take reasonable care to avoid causing harms to others from their activities, what is added by framing these cases in terms of a corporate duty to respect human rights?

The answer to that question is twofold. Firstly, using the language of human rights to describe the injury to the plaintiffs may help to ground climate tort cases in rights-based paradigms of tort law, avoiding the problems encountered by past plaintiffs who have taken a more instrumentalist approach. Secondly, plaintiffs may rely on the UNGPs and the plethora of scholarship and corporate documents that have emerged around them as evidence of a societal expectation that corporations should conduct HRDD to identify human rights impacts associated with their activities and then avoid, mitigate, or remediate those impacts. By publishing human rights policies or claiming to comply with voluntary human rights schemes, companies are accepting that this societal expectation already exists. This widespread acceptance of the UNGPs also creates a further expectation amongst those that may suffer harm as a result of corporate activities that those harms will be identified, stopped, mitigated or remediated – expectations which could create the sort of relationship of proximity that is essential to meet the test for a novel duty of care. In the final part of this section, I identify a number of recent cases in which corporate contributions to the discourse around CSR have been used as evidence of a proximate relationship between parties

[111] UNGPs, *supra* at note 17 at 1

in tort litigation. As I will argue further in the next two chapters of this thesis, statements by the Carbon Majors acknowledging their responsibility to respect human rights and the need to manage climate risks could provide climate accountability plaintiffs with the basis for making similar arguments.

2.3.3 CSR statements as evidence of proximity

Recent years have seen an increase in the number of cases which touch on questions about what role international "soft-law" standards and corporate statements about respect for human rights and the environment should play in the analysis of tort law standards and duties being filed in common law jurisdictions.[112] While many early claims in this area were largely brought in the US under the *Alien Tort Statute (ATS)*, the restrictive application of the *ATS* by the Supreme Court of the US has seen an increase in common law claims being brought elsewhere.[113] In this section, I argue that judicial responses to some of these claims could be seen as part of a growing trend towards holding corporate actors accountable to voluntarily accepted standards of responsibility. The cases discussed in this section are therefore crucial precedents on which climate accountability plaintiffs could rely.

In his discussion of this issue, Cassel relies on the example of *Akpan v Shell*, a case in which a court in the Netherlands applied Nigerian common law in accordance with Dutch choice of law

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[112] See Wettstein and Schrempf-Stirling, *supra* at note 55 at 549

[113] Sean Fairhurst and Zoe Thoms, "Post-Kiobel v. Royal Dutch Petroleum Co.: is Canada poised to become an alternative jurisdiction for extraterritorial human rights litigation?" (2014) 52:2 Alberta L. Rev. 389

rules.[114] The claimants alleged that Royal Dutch Shell (RDS) and its Nigerian subsidiary the Shell Petroleum Development Company (SPDC) were liable for negligently causing or failing to prevent oil pollution in the Niger Delta. After asserting jurisdiction to hear the case, the court of first instance granted merits relief to one of the claimants against SPDC, but dismissed all the claims against RDS. This ruling, however, has since been appealed to the Court of Appeal in the Hague, which issued a preliminary ruling suggesting that the claims against RDS might well be upheld. The Court of Appeal relied on a British precedent, *Chandler v Cape Plc*, which held that where a parent company was directly involved in the activities of a subsidiary and had "superior knowledge or expertise" which could have prevented harm to its employees, the parent company could have a direct duty to the employees of its subsidiary.[115] In applying the test for a novel duty of care, the Dutch Court appears to have relied on Shell's CSR statements, in which it had "made a focal point of preventing environmental damage by activities of its subsidiaries", to hold that the duty from *Chandler* could be extended not only to employees of a subsidiary but to any person affected by that subsidiary's activities. [116]

There may be some doubt as to the authority that the Dutch court's application of an English precedent in a case heard under Nigerian common law might carry in other jurisdictions. However,

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[114] *Akpan v Royal Dutch Shell PLC,* Arrondissementsrechtbank Den Haag, 30 January 2013 Case No C/09/337050/HA ZA 09-1580, translation in van Dam, *Preliminary judgments Dutch Court of Appeal in Shell Nigeria case* (2016) online: < http://www.ceesvandam.info/default.asp?fileid=643> (*last accessed October 5th, 2018)*; See Cassel, *supra* at note 19 for further discussion.

[115] *Chandler v Cape Plc* [2012] EWCA Civ 525 ("*Chandler*")

[116] District Court The Hague 30 January 2013, (Akpan/Shell), partially translated in Cees van Dam, *Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case, (*2016), online at: *http://www.ceesvandam.info/default.asp?fileid=643* (*last accessed July 31st, 2018*)

a similar line of reasoning was also taken in a recent case before the Court of Appeal of England and Wales, which may carry more weight. In the 2017 case of *Lungowe and Ors v. Vedanta Resources Plc*, the Court of Appeal affirmed that, although there were no previous reported cases in which a parent company had been held to owe a duty to people affected by the operations of its subsidiaries who were not employees, such a case was arguable.[117] Whether the parent could be held to owe a duty of care in such circumstances should be determined by the application of tests analogous to those used in determining a duty to employees set out in *Chandler*. The Court of Appeal affirmed the trial judge's assessment that Vedanta's published policy documents and statements regarding its commitment to social and environmental standards across group operations were valid *prima facie* evidence that a duty of care existed.[118] Although neither case directly concerns HRDD, both *Akpan* and *Lungowe* show how important CSR statements and norms can be in determining whether a relationship of proximity exists between a group of plaintiffs and corporate defendants.

The same concerns are also reflected in the Canadian case of *Choc v Hudbay*, which contains the most explicit reference yet to the relevance of HRDD obligations to the existence of a duty of care.[119] In 2010, three related law suits were filed by members of the Mayan Q'eqchi' community in Guatemala against the Canadian Mining Company Hudbay Minerals Inc. Hudbay owned and

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[117] *Lungowe, supra* at note 40. It should be noted that in another recent case *Okpabi & Ors v Royal Dutch Shell Plc & Anor* (Rev 1) [2018] EWCA Civ 191, the UK Court of Appeal upheld the decision in *Lungowe* but distinguished the case on the facts to find that no relationship of proximity existed between Shell, the parent company, and the third parties affected by the operations of its subsidiary.

[118] *ibid.*

[119] *Hudbay, supra* at note 40

operated the Fenix mining project in Guatemala through a wholly-controlled Guatemalan subsidiary. The claimants alleged that security forces employed at the mine engaged in serious violations of the rights of members of the Mayan Q'eqchi' community who were peacefully opposing the occupation of traditional Mayan lands. The violations enumerated in the complaints included the use of violence against protesters, which had resulted in at least one death, as well as forced evictions, damage to homes and livelihoods, and the commission of gang rapes during those evictions.[120]

In response, Hudbay filed a number of motions to dismiss. One of the central questions before the court when deciding whether to allow the case to proceed was whether the plaintiffs claim disclosed a reasonable cause of action in negligence, i.e whether it was "plain and obvious" that no novel duty of care could be established on the facts of the case.[121] The court heard arguments from both the plaintiffs and from Amnesty International as intervenors that there was strong evidence in favour of imposing a duty.[122] Both parties relied on Hudbay's endorsement of the *Voluntary Principles on Security and Human Rights* (human rights guidelines designed specifically for the extractive industry), Canada's endorsement of the UNGPs, and Hudbay's public statements regarding its responsibility for the operations of the mine. It is clear that the court considered these arguments to be of some significance when determining whether an arguable duty existed. When discussing the proximity requirement, the court noted that, based on the plaintiffs' submissions, Hudbay had "made public representations concerning its relationship with local

[120] *ibid* at 4-7
[121] *ibid* at 18
[122] *Ibid* at 26, 33-36

communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs."[123] Ultimately, the court concluded that here was a reasonable basis for the action to proceed, and that "the plaintiffs have properly pleaded the elements necessary to recognize a novel duty of care."[124] The case is now expected to proceed to trial.

Taken together, the cases can be seen as the beginning of a movement by common law courts to hold corporate actors accountable to the standards they claim to uphold. Industry custom has long been considered relevant in determining the existence of a duty of care and the standards required to discharge that duty.[125] The emerging corporate acceptance of international norms and standards is no exception. Widespread corporate acceptance of the responsibility to conduct HRDD can be crucial evidence in demonstrating the existence of a relationship on which a duty of care may be founded.

In the next two chapters of this thesis, I examine what statements and policy commitments the Carbon Majors themselves have made that may suggest a relationship of proximity to those who have suffered or will suffer climate related human rights impacts. I then consider how these statements might be relevant to the analysis for a duty of care in light of the precedents discussed in this section. Before doing so, however, I now turn to a discussion of the literature on the human rights impacts of climate change.

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[123] *Ibid* at 69
[124] *Ibid* at 75
[125] Hunter and Salzman, *supra* at note 15

2.4 Human rights, climate change, and the 'rights turn' in climate litigation

In this section, I explain the now well-established connection between climate change and human rights. I describe how this connection has recently been used in climate litigation against governments. By emphasising the human rights impacts of climate change, plaintiffs have been able to persuade courts that choosing not to act to prevent climate change is not a simple policy decision but a violation of the state's fundamental obligation to safeguard the rights of citizens. This has prompted courts across a range of jurisdictions to issue orders clarifying the human rights responsibilities of states in the climate context and requiring governments to do more to address the causes and impacts of climate change. I argue that although the business responsibility to respect human rights differs from the state duty to protect human rights, similar rights-based arguments may nonetheless provide a principled basis for clarifying the responsibilities of businesses through tort litigation. Having established how rights-based arguments may help climate accountability plaintiffs to establish a duty of care on the part of the Carbon Majors, I then briefly consider what existing scholarship suggests about the standard of conduct that may be required to discharge that duty. I determine that existing scholarship on corporate obligations in the climate context could help inform the development of relevant HRDD processes. Although difficult, I conclude that the development of such processes is feasible and may therefore reasonably be used to inform the standards of conduct to which courts may be willing to the Carbon Majors.

2.4.1 Climate change and human rights

Scholarship connecting climate change and human rights has its roots in the environmental rights movement, which emerged in the 1970s.[126] This movement is premised on the simple idea that without a safe and healthy environment in which to enjoy them, other human rights become meaningless.[127] In 1972, the Declaration of the United Nations Conference on the Human Environment ("the Stockholm Declaration") was the first international instrument to adopt the language of rights in the environmental context.[128] The first principle of the Stockholm Declaration states "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[129] While UN Declarations are not generally legally binding, as the Canadian representative at the Conference noted during the debate, the Declaration "represented the first essential step in developing international environmental law."[130] Over the past fifty years further steps have been taken environmental rights movement has gained considerable traction. Many international instruments and national constitutions now include explicit protections for environmental rights.[131]

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[126] David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, (Vancouver: UBC Press, 2011) at 20
[127] *Ibid*. at 21
[128] *Ibid*. at 13
[129] Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"), June 1972 available online at: <http://www.un-documents.net/unchedec.htm> (*last accessed October 5th, 2018*)
[130] Report of the United National Conference on the Human Environment, Stockholm, June 1972 A/CONF.48/14/Rev.1 at 49, available online at: <http://www.un-documents.net/aconf48-14r1.pdf> (*last accessed October 5th, 2018*)
[131] Boyd, *supra* at note 126 at 45

As climate change has emerged as the most pressing environmental issue of our time, it has come to dominate much of the recent discussion of environmental rights. A plethora of literature considering climate change's impact on the right to life, health, food, housing, and even self-determination has emerged.[132] While this literature builds on the earlier scholarship around environmental rights, climate change nonetheless poses a unique set of problems. When the first legal petition raising climate change as a human rights issue came before the Inter-American Commission on Human Rights in 2005, few people expected the Commission to issue a positive response.[133] As John Knox, the Special Rapporteur on Human Rights and the Environment has explained, at the time that it was filed, the petition seemed "quixotic".[134] In view of the global ubiquity of fossil fuel use and the diffuse nature of GHG emissions and their impacts, the petitioners' attempt to hold the United States Government accountable for refusing to commit to mandatory reductions of greenhouse gas emissions seemed the legal equivalent of tilting at windmills.

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[132] See for example Mouloud Boumghar and Ottavio Quirico (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective*, (London and New York: Routledge 2016); International Bar Association: *Climate Justice and Human Rights Task Force Report, Achieving Justice and Human Rights in an Era of Climate Disruption*, (IBA, 2014), online at <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> (*last accessed September 7, 2018*); Michael Burger and Jessica Wentz, *Climate Change and Human Rights*, (New York: UNEP, December 2015), online at: <http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf> (*last accessed September 7, 2018*)

[133] Inuit Circumpolar Conference, *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*, Submitted by Sheila Watt-Cloutier (7 December 2005), with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Regions of the United States and Canada, online: <http:// inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> (*last accessed September 5, 2018*); For an analysis of the importance of the petition and its success as a piece of "creative lawyering" see Hari M. Osofsky, *The Inuit Petition as a Bridge: Beyond the Dialectics of Climate Change and Indigenous Peoples' Rights,* (2006) 31:2 AILR at 675

[134] John Knox, *Foreward: Climate Change and Human Rights*, supra at note 132

Over a decade later, the problem of climate change is more urgent than ever.[135] In the face of slow-moving international negotiations and ineffective government policies, those advocating for climate solutions have continued to engage with the language of human rights. As communities across the globe begin to suffer the devastating impacts of extreme weather events made far more likely by climate change, their message is starting to hit home.[136] Following nearly a decade of discussion and debate at the UN level on the human rights implications of Climate Change, the international debate on human rights and climate change has been described as reaching a "crescendo" at the twenty-first conference of parties to the United Nations Framework Convention on Climate Change (UNFCCC) in 2015.[137] This session resulted in the Paris Agreement, which is the first instrument under the UNFCCC to explicitly link human rights and climate change. The preamble to the agreement states:

> "*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."[138]

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[135] Christiana Figueres et al, *Three years to safeguard our climate*, (2017) 546:7760 Nature, available online at: <https://www.nature.com/news/three-years-to-safeguard-our-climate-1.22201> (*last accessed October 4th, 2018)*

[136] Climate Communications, Overview: Current Extreme Weather & Climate Change, available online at: <https://www.climatecommunication.org/new/features/extreme-weather/overview/> (*last accessed October 4th, 2018*)

[137] John H. Knox, "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment" UN Doc A/HRC/31/52 at [17]

[138] *Paris Agreement*, United Nations 2015, adopted pursuant to Decision 1/CP.21, FCCC/CP/2015/10/Add.1

As Knox noted in a report to the Human Rights Council in 2016, "[i]n an important sense, the Paris Agreement signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations."[139]

At the same time as the human rights dimension of climate change is being recognized in international instruments and policy documents, it is also beginning to be recognized by domestic courts. As Mansoor Ali Shah, now a Justice of the Supreme Court of Pakistan, noted when responding to a Constitutional Challenge regarding the impacts of climate change on the fundamental rights of Pakistani Citizens in the case of *Legahri v Federation of Pakistan,* climate change is the "defining challenge of our time".[140] Courts are waking up to the need to refashion environmental jurisprudence "to meet the needs of something more urgent and overpowering i.e., Climate Change. From Environmental Justice, which was largely localized and limited to our own ecosystems and biodiversity, we need to move to Climate Change Justice."[141]

2.4.2 The rights-turn in climate litigation

In this section, I argue that Mansoor Ali Shah's comments are just one example of a larger phenomenon which has seen courts across many different jurisdictions respond positively to human rights-based arguments in climate litigation. As I argued above, emphasising how climate

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[139] Knox, *supra* at note 137 at [22]

[140] *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015

[141] *Ibid*.

change impacts the fundamental rights of climate litigants is one way of shifting the discussion about responsibility for climate change from one about economic policy decisions to one about more fundamental issues of legal principle. The cases discussed below demonstrate how climate plaintiffs are putting these arguments into action. Osofsky and Peel have labelled this trend a "rights-turn" in climate litigation.[142] They identify six recent cases from around the world in which climate claimants have turned to rights-based arguments.[143] All of these cases have seen plaintiffs using the language of rights to emphasise the real world impacts of climate change. As Osofsky and Peel note, the number of cases considered in their article is "hardly statistically significant".[144] But what may be more significant is the fact that so far all of these cases have met with some measure of success, suggesting a "growing receptivity of courts to this framing".[145] As I will discuss further below, a number of more recent cases not included in the discussion by Osofsky and Peel also confirm this trend.

Among the cases discussed by Osofsky and Peel are two cases involving direct constitutional challenges to government inaction on climate change. The first is the *Leghari* case discussed above. The second is the case of *Juliana et al. v United States*, currently pending before the United

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[142] Osofsky and Peel, *supra* at note 20

[143] The six cases discussed include: *Leghari*, *supra* at note 140; *Juliana v. United States*, No. 6:15-cv-01517, (D.Or., 10 Nov. 2016) (Aiken, J.), 46 ELR 20175 ("*Juliana"*); *Urgenda Foundation v. Kingdom of the Netherlands*, [2015] HAZA C/09/00456689, District Court, the Hague, Netherlands ("*Urgenda"*); *Third Runway at Vienna International Airport case*, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017; *Earthlife Africa Johannesburg v. Minister for Environmental Affairs & Others*, Case No. 65662/16 Judgment of High Court of South Africa, Gauteng Division, Pretoria, 8 Mar. 2017; *In re Greenpeace Southeast Asia & Ors,* Case No. CHR-NI-2016-0001, Philippines Commission on Human Rights, 5 Dec. 2015 ("*In re Greenpeace Southeast Asia"*). Details available online from the Climate Litigation Databases, *supra* at note 9

[144] Osofksy and Peel, *supra* at note 20 at 25

[145] *Ibid*. at 4

States District Court for the District of Oregon.[146] Although caution is needed in comparing or generalizing across different jurisdictions, these cases share a number of significant features. Most importantly, the judgments in both cases demonstrate a powerful sense of urgency and an awareness of the magnitude of the issues at stake. The plaintiffs in *Juliana* alleged that the actions and policies of the US Government were a significant cause of climate change and a violation of the plaintiffs' constitutional rights.[147] In a landmark judgment issued in November 2016, Federal District Judge Ann Aiken denied the motions. In her opinion, she noted that "this action is of a different order than the typical environmental case", because it concerns questions about the plaintiffs' fundamental rights to life and liberty.[148] She noted that "a deep resistance to change" ran through the arguments proffered by the defendants, but argued that novelty is not in and of itself a reason for a common law judge to dismiss a case.[149] In fact, she argued, the serious nature of the allegations, and their potential to impact the most basic of fundamental rights, was a factor weighing in favour of judicial intervention: "Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."[150] Judge Aiken's comments suggest that where fundamental questions of rights and justice are at stake, judges may be more open to novel and creative solutions.

Among the other examples cited by Osofsky and Peel is the case of *Urgenda Foundation v State of the Netherlands*, a case heard by The Hague District Court in June 2015 (currently under

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[146] *Juliana*, *supra* at note 143
[147] *ibid* at 2
[148] *Ibid*. at 52
[149] *Ibid.*
[150] *Ibid.* at 54

appeal).[151] The Urgenda Foundation and a number of Dutch citizens brought claims in negligence against the Dutch Government for its failure to protect citizens from the impacts of climate change by implementing policies that would limit GHG emissions in the Netherlands by at least 25% by 2020.[152] The claims in *Urgenda* incorporated arguments based on violations of the European Convention on Human Rights (ECHR), including the right to life under Article 2 ECHR. The court held that these provisions were not directly enforceable by the claimants, but that they could nonetheless "serve as a source of interpretation when detailing and implementing open private-law standards". These human rights arguments were a key element of the court's finding that the Dutch Government did indeed owe a duty of care to limit the harm caused by GHGs.[153] The novel finding of a duty of care in the case was the first of its kind, and Roger Cox, the lead counsel in the case, has emphasized its precedential value for cases against governments and companies. In an article written in 2015 he predicted that over the coming years "countries and large fossil fuel companies have to pay more serious attention than in the past to the fact that **tort law and human rights law** will play a greater role in the climate debate".[154] The accuracy of Cox's prediction is already becoming clear. The Sabin Centre for Climate Change Law has identified at least five additional cases against governments in which human rights arguments have played a key role.[155]

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[151] Osofksy and Peel *supra* at note 20
[152] *Urgenda*, *supra* at note 143
[153] *Ibid*. at [4.46]
[154] Roger Cox, "A climate change litigation precedent: *Urgenda Foundation v The State of the Netherlands"* (2016) JERL, 34:2, 143-163, at 163 (emphasis added)
[155] See *Verein KlimaSeniorinnen Schweiz v. Bundesrat* (*Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council)* 2016; *Plan B v Secretary of State for Business* Claim No. CO/16/2018*; Demanda Generaciones Futuras v. Minambiente (Future Generations v. Ministry of the Environment and Others) ("Future generations"); Inter-American Commission on Human Rights Advisory Opinion* OC-23/17 of November 15, 2017 *Requested by The Republic of Colombia; Armando Ferrão Carvalho and Others v. The European Parliament and the Council Case (2018).* Details available online from the Climate Litigation Databases, *supra* at note 9

Although a recent application for judicial review of government emissions targets in the UK was initially refused, many of the others have met with successes similar to those in *Leghari* and *Juliana.*[156] These cases, which have all seen climate plaintiffs relying on rights-based causes of action, can be taken as further evidence that the rights arguments advanced in cases like *Juliana* are beginning to gain ground globally.

The cases discussed in this section all share a common goal: reframing climate change as an urgent issue of justice and fairness, something which affects the daily realities and fundamental rights of people around the world. While, as Osofsky and Peel also acknowledge, it is still early days for many of these cases, the persuasive value of these rights-based arguments is already becoming clear. By relying on rights-based theories of tort, climate accountability plaintiffs can also harness the power of these arguments in cases against companies. The value of such arguments can also be seen in the work of judges-turned-scholars who have argued for a greater judicial role in responding to climate change. Brian J. Preston, the Chief Judge of the Land and Environment Court of New South Wales, for example, has argued that the courts are uniquely well-placed to play a role in tackling the problems of climate change and to "uphold people's rights and remedy

[156] In the UK case of *Plan B v Secretary of State for Business* an Appeal to the Court of Appeal was filed on 26 July 2018, see Plan B Website, online at < https://planb.earth/plan-b-v-uk/> (*last accessed 31st July, 2018*); In *Future Generations* the Supreme Court of Colombia granted an application by youth plaintiffs for a tutela – a rights-based form of injunction – against the Colombian government for its inaction on climate change. Echoing the powerful language employed in the previous cases, the court noted "[w]ithout a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations…The increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights; it gradually depletes life and all its related rights."

legal wrongs done to people relating to climate change".[157] Alfred T Goodwin, a former justice of the Oregon Supreme Court has also argued that the judiciary should play a more active role in generating solutions to climate change, predicting that the coming years will see a "critical mass" of climate change litigation that will pit "the rights of the people of the United States" against "corporate capital".[158] For many common law scholars and judges, ensuring the protection of individual rights remains the cornerstone of the judicial role.[159] Emphasizing that this is what is being asked of judges in climate accountability cases could help these cases find judicial favour.

2.4.3 The rights-turn in private law

The rights-based climate cases discussed in the preceding section all involve actions against governments. But as I have argued in the first two sections of this chapter, rights-based theories of tort and the new norms contained in the UNGPS provide a clear pathway for climate accountability plaintiffs whose human rights have been impacted by climate change to use the same arguments in cases against corporations. How business and human rights norms are engaged in the context of climate change is already the subject of a final rights-based climate case discussed by Osofsky and Peel: an investigation by the Philippines Commission on Human Rights (PCHR) into the Carbon Majors' responsibility for human rights impacts associated with climate change (also known as *ex parte Greenpeace South East Asia*).[160]

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[157] Brian J Preston, "The Contribution of the Courts in Tackling Climate Change, Journal of Environmental law", 2016, 28:1 JEL 11- 17

[158] Hon Alfred T. Goodwin, "Book Review: A Wake-Up Call For Judges" (2015) Wis. L. Rev. 785 at 1

[159] See Ronald Dworkin, "Hard Cases", in Dennis Patterson, ed., *Philosophy of Law and Legal Theory: An Anthology* (Oxford: Blackwell 2003) at 149

[160] Osofsky and Peel, *supra* at note 20

In September 2015 Greenpeace South East Asia and a coalition of NGOs and individuals known as the Philippine Rural Reconstruction Movement filed a petition before the PCHR.[161] In it, they argued that the Carbon Majors were responsible for major human rights violations associated with climate change, including the devastating impacts of Typhoon Haiyan, which made landfall in the Philippines in 2013.[162] Relying heavily on the corporate duty to respect set out in the UNGPs, the petitioners urged the PCHR to conduct a comprehensive investigation into the Carbon Majors' responsibility for climate change, recommend the adoption of "effective accountability mechanisms", and request that the Carbon Majors submit plans on how rights violations caused by climate change would be eliminated or remediated.[163] In December 2017, the PCHR indicated that it would accept the petition and conduct the investigation requested, rejecting arguments by the respondent fossil fuel corporations that it had no jurisdiction to do so.[164] The Filipino press has reported that the stated aim of the PCHR is to "determine whether or not climate change impacts human rights, whether carbon majors are responsible for such, and if they do, "what can or should be done about it.""[165]

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[161] *In re Greenpeace Southeast Asia & Ors*, (Petition to the Commission, May 12, 2015), available online at: Sabin Centre for Climate Change Law <http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> ("the petition") (*last accessed October 4th, 2018*)

[162] *Ibid.*

[163] *ibid*. at 31

[164] Nicole-Anne Lagrimas, CHR sets 2019 target for results of landmark rights-based climate change probe, (December 12, 2017), online: GMA News < http://www.gmanetwork.com/news/news/nation/636263/chr-sets-2019-target-for-results-of-landmark-rights-based-climate-change-probe/story/> (*last accessed October 4th, 2018*)

[165] *ibid*.

The PCHR's bold decision to proceed with the investigation is a significant departure from the approach taken by both courts and human rights tribunals in early climate accountability cases against corporations.[166] As the Commissioners themselves have noted, although it would not automatically be binding on the international community, a finding of fact by the PCHR that the Carbon Majors were responsible for climate related human rights violations in breach of the responsibility to respect human rights under the UNGPs could well form the basis for tort litigation brought by the petitioners or others who have suffered comparable harms.[167] Of the 50 MNCs listed in the petition, 33 are domiciled in common law countries, so it is highly likely that such litigation will end up before common law courts.[168] While any such case would be ground-breaking, it would nevertheless be supported by precedents such as *Choc v Hudbay* discussed above, increasing its chances of success.[169]

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[166] See further the discussion of *the Inuit Petition to the IACHR* in Chapter 2 Section 4.i and the case of *Kivalina* in Chapter 1 Section 1.4. See also *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California v. Gen. Motors Corp.*, 37 ELR 20239 (N.D. Cal. 2007). For a full discussion of these cases and other climate tort precedents from the US and Australia see Collins and Mcleod-Kilmurray, *supra* at note 11 at 272.

[167] Lagrimas, *supra* at note 164

[168] See the petition, *supra* at note 161 at 5 for a full list of the Carbon Majors and their countries of domicile (reproduced below in Chapter 3 Section 3.4.3);

[169] It should be noted that Friends of the Earth Netherlands (Milieudefensie) has already indicated its intention to bring a case in tort against Shell before the Dutch courts. In its letter before action, Milieudefensie cites Shell's "responsibility to respect human rights" as a relevant factor in engaging the duty to act with due diligence under the Dutch law of negligence. While the case will not be heard in a common law jurisdiction, its outcome may nevertheless be persuasive in common law jurisdictions. See Letter from Donald Pols, Director of Friends of the Earth Netherlands (Milieudefensie) to B.C.A.M van Beurden, CEO of Royal Dutch Shell (April 4th, 2018) (Unofficial translation of the Dutch original) available online at < https://en.milieudefensie.nl/news/noticeletter-shell.pdf> (*last accessed September 6, 2018*)

2.4.4 Implementing the responsibility to respect human rights in the climate context

In any analysis of a new duty of care, some consideration must be given as to how that duty should be implemented. As Hunter and Salzmann have argued, whether a duty to take certain actions is imposed on a defendant may in part depend on the feasibility of taking those actions.[170] If a company's commitments to conducting HRDD contribute to establishing a duty of care in respect of climate related human rights harms, it becomes necessary to ask: what is the standard of care required to discharge that duty? Determining the answer this question will not be simple. As noted above, the question of precisely "how" due diligence should be conducted is still open to debate.[171] When it comes to climate related human rights harms there may be even greater uncertainty around this issue than in other circumstances. Resolving debates about the degree to which each of the Carbon Majors must eliminate their individual contributions to global GHG emissions and how quickly they should be expected to do so will take time. Nor is there a simple answer to the question of the "fair share" that each corporation should contribute to community adaptation efforts and of which communities should benefit first from these contributions. Nonetheless, there is an urgent need for scholars, practitioners, judges, and lawyers to begin to engage with these questions, and some are already starting do so.

In its report *Achieving Justice and Human Rights in an Era of Climate Disruption,* the International Bar Association's Task Force on Climate Justice provided an important early discussion of the application of human rights due diligence in the climate context.[172] But, as Seck and Slattery

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[170] Hunter and Salzman, *supra* at note 15 at 1780
[171] See Mccorquodale et al, *supra* at note 91
[172] IBA Task Force, *supra* at note 132

observe, the Task Force's report is "not a fully comprehensive treatment".[173] In fact, they observe that there is a general lack of scholarship or guidance available to help companies to develop HRDD processes to address environmental rights issues in general, and on climate rights issues in particular.[174] In next chapters of this thesis, I argue that even in the absence of such guidance corporations may themselves be developing processes, recognising that doing so allows them to have an important role in determining what such processes should look like. Developing a better understanding of existing corporate practice applying the UNGPs to environmental harms is therefore crucial for understanding what standards of practice can and should be expected in this area. Before turning to that issue however, I briefly consider how existing scholarship regarding corporate responsibility for climate harms may also provide a basis for determining what HRDD in the climate context could look like, even when that scholarship is not framed explicitly in human rights terms.

In late 2017, a group of legal experts launched the first version of the *Climate Principles for Enterprises*, which aim to provide guidelines for corporations to reduce their GHG emissions in order to limit global warming to less than 2 degrees above pre-industrial levels.[175] The *Principles* build on earlier efforts by eminent jurists to develop a set of guidelines for states to reduce their emissions, which are known as the *Oslo Principles on Global Climate Obligations,* and were

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[173] Sara L. Seck and Michael Slattery, "Business, Human Rights and the IBA Climate Justice Report" (2016) 34:1 J Energy & Nat Resources Law 75-85 at 84

[174] *Ibid* at 79

[175] Expert Group on Climate Obligations of Enterprises, "Principles on Climate Obligations of Enterprises" (2018, Eleven International Publishing), online at < https://climateprinciplesforenterprises.files.wordpress.com/2017/12/enterprisesprincipleswebpdf.pdf> (*last accessed July 31st, 2018*)

launched in 2015.[176] Both sets of principles aim to elucidate the state of existing law and emissions reduction obligations generated by tort law, human rights law, international law, and environmental law, and to provide guidelines for how states and businesses should comply with these obligations. As the authors of the principles acknowledge, the principles are only a first step.[177] They concern only emissions reduction targets and say nothing about contributing to the costs of adaptation and the need to remediate loss and damage caused by climate change. Arguably, they are also insufficiently ambitious, since their stated goal is to see enterprises contribute to emissions reduction that would limit global warming to 2 degrees Celsius above pre-industrial levels, rather than using the 1.5 degree target that was incorporated into the Paris Agreement.[178] Nonetheless, as the authors note, "if the reduction obligations formulated in these principles turned out to be mistaken, that would not mean that enterprises do *not* have *any* reduction obligations."[179] Instead, they argue that such obligations are clearly already required as a matter of legal principle. In the absence of legislated targets, the authors suggest that courts are highly likely to step in to fill the gaps, meaning that "the odds are against those who believe that they can stick to business as usual as long as pertinent case law or black letter law is unavailable."[180] Relying on the principles may provide a basis for developing the emissions reduction obligations that would be

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[176] Expert Group on Global Climate Obligations. "Commentary on Oslo Principles on Global Climate Change Obligations" (2015), available online at: <http://www.yale.edu/macmillan/globaljustice/OsloPrinciplesCommentary.pdf> > (*last accessed September 7, 2018*)

[177] Principles for Enterprises, *supra* at note 175 at 40

[178] *Ibid.* at 23

[179] *Ibid.* at 40

[180] *Ibid*. at 38

required for the Carbon Majors to comply with the responsibility to avoid or mitigate climate related human rights harms.

Another area of existing scholarship that may provide some assistance in developing guidance for the application of HRDD in the climate context is that concerning climate compensation schemes. Gage and Wewerinke-Singh, for example, have drafted a "Model Climate Compensation Act", which they argue could "clarify the law related to climate change litigation".[181] The model act creates rules around who is entitled to sue for compensation, who can be sued (limiting liability to 'Major Emitters'), and, most importantly for our purposes "the apportionment of climate-related damages between defendants on the basis of their contribution to climate change, including addressing overlapping emissions by more than one defendant."[182] Chalifour et al have also advocated the passage of climate compensation legislation, which "could establish rules relating to market share liability, so that responsibility can be apportioned appropriately among major GHG emitters or producers over a given period of time."[183] The principles for apportioning liability between the Carbon Majors developed by these scholars could perhaps be applied by the Carbon Majors themselves when determining what a reasonable contribution to efforts to remediate climate related human rights impacts might look like.

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[181] Andrew Gage and Margaretha Wewerinke, "Taking Climate Justice Into Our Own Hands: A Model Climate Compensation Act" (West Coast Environmental Law and Vanuatu Environmental Law Association, 2015), at 5, available online at: < https://ssrn.com/abstract=2906252> (*last accessed September 3rd, 2018*)

[182] *Ibid.* at 6

[183] see Chalifour, Collins and Mcleod-Kilmurray, *supra* at note 56 at 383

Even with the foundations provided by the *Principles* and existing scholarship on climate compensation schemes, developing practical processes to implement HRDD and the responsibility to remediate in the climate context will be a complex process. But as the preceding discussion has demonstrated, engaging with that process is increasingly necessary. Efforts to ensure that the Carbon Majors are held accountable for their share of the costs of climate change are certain to continue. And if the outcomes from years of litigation against the tobacco and asbestos industries are anything to go by, as states begin to struggle under the mounting costs of climate adaptation, courts, legislatures, and international bodies are all likely to become more receptive to them.[184] Indeed, the idea of a "fossil fuel extraction levy" is already being considered as one way of paying for an international mechanism to address climate related loss and damage.[185] It seems likely that it is only a matter of time before these discussions at the international level filter into discussions at the national and provincial level as well. By engaging with these issues head on the Carbon Majors could not only avoid costly litigation or externally imposed levies, but could also play a proactive role in limiting the already serious human rights impacts of climate change on communities around the world, demonstrating a true commitment to responsible business conduct.

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[184] *ibid*

[185] Executive Committee of the Warsaw International Mechanism for Loss and Damage, "Best Practices, Challenges and Lessons Learned from Existing Financial Instruments at all Levels that Address the Risk of Loss and Damage Associated with the Adverse Effects of Climate Change" (Information Paper, 2016), 20 available online at http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/information_paper_aa7d_april_2016.pdf *(last accessed September 3, 2018*); For further discussion see Keely Boom, Julie-Anne Richards and Stephen Leonard, "Climate Justice: The international momentum towards climate litigation" (2016) at 62 available online at: < https://www.boell.de/sites/default/files/report-climate-justice-2016.pdf> (*last accessed September 3, 2018*)

2.5 Chapter Conclusion: Why should the responsibility to respect human rights matter to climate accountability plaintiffs?

Much of our legal thinking is dictated by the classifications we read in our textbooks. As Stevens has noted "labels and structures matter, as they inevitably shape our understanding of the law".[186] But while applying labels to legal categories can help us to order our thoughts, this should not be taken to mean that those categories "can be understood in isolation".[187] In this chapter I have sought to bring together two parallel areas of legal scholarship: the literature around the interplay between the responsibility to respect human rights and duties of care in tort law, and the literature framing climate change as a human rights issue. I have argued that by connecting these areas, climate accountability plaintiffs can introduce the human rights arguments that have begun to be successful in climate litigation against states into climate litigation against corporations. Emphasizing the issues of fundamental rights at stake may be crucial to persuading judges to develop the common law in ways that overcome many of the "traditional doctrinal hurdles" that have posed problems to climate accountability plaintiffs to date.[188] In particular, the responsibility to respect human rights and the concept of HRDD may help climate accountability plaintiffs to establish a relationship of "proximity" between themselves and corporate defendants including the Carbon Majors. As I shall explore further in the following chapters, existing human rights due diligence practices, particularly in the context of environmental rights, may also provide important models for determining what may be expected of corporations by those to whom a duty is owed.

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[186] Stevens *supra* at note 62 at 305
[187] *Ibid.* at 285
[188] Kysar, *supra* at note 10

The rights-based arguments set out in this chapter may provide only one possible route by which climate accountability plaintiffs could establish a duty of care on the part of the Carbon Majors. But these arguments may prove to be among the most persuasive. As Kysar has argued, a focus on the economic aspects of climate change has so far failed to yield the necessary results from either governments or the courts.[189] By focusing instead on the underlying moral questions of fairness, justice, and responsibility posed by climate change, climate accountability plaintiffs may be able to change the course of the conversation both in the courtroom and beyond.

[189] Kysar, *supra* at note 10

Chapter 3: Human rights and climate risk: understanding the current practice of the Carbon Majors Part I (methodology and results)

3.1 Introduction

In the previous chapter I argued that the responsibility to respect human rights and the new norms around HRDD contained in the UNGPs could help to establish a duty of care on the part of fossil fuel companies to individuals and communities who may affected by climate related human rights harms. In this chapter, I set out the rationale and methodology for an empirical investigation of the degree to which existing public statements by the Carbon Majors – the most likely defendants in climate accountability litigation – demonstrate acceptance of the responsibility to respect human rights and the obligation to conduct HRDD. I also examine the corporations' statements regarding the existence of foreseeable physical risks posed by climate change and identify references to responsibility towards communities affected by those risks. In the next chapter, I then set out the results of this study and provide an analysis of their relevance to the existence of a duty of care for climate related human rights harms.

Roger Cox, lead counsel for Urgenda Foundation in *Urgenda* (discussed above), has explained that Urgenda made the decision to sue the Government rather than a fossil fuel company precisely because the Dutch government's public statements on climate change meant that it could not argue that it was unaware of climate risks and its responsibility to act to prevent them.[190] He noted that these statements were relevant in determining the existence of a duty of care: "the universal

[190] Cox, *supra* at note 154; See discussion of *Urgenda* in Chapter 2 Section 2.4.2

consensus regarding dangerous climate change and the consensus (based on scientific arguments) among industrialized countries regarding the contribution they should make in order to avert this danger can be important in defining what should be regarded as socially responsible behaviour."[191] By compiling and analyzing nearly 200 statements made by the Carbon Majors, I demonstrate that these companies have also made statements that demonstrate that they are both aware of the risks of climate change and of their responsibility to avoid contributing to human rights harms. I then analyze how these statements contribute to defining the limits of socially responsible behavior for corporations, demonstrating that these statements provide powerful evidence which could help to establish a duty of care in the climate context.

In this chapter, I begin by explaining the role of private actors in the development of legal norms and demonstrating how an understanding of existing corporate practice is crucial to understanding the process by which "soft law" norms may evolve into hard law standards. I then briefly review the existing literature examining the Carbon Majors' acknowledgment of climate risk, before explaining how my research complements this literature, adding to existing analyses by focusing on the interaction between statements on climate risk and statements about human rights, and by taking a more horizontal approach to the Carbon Majors as a group rather than focusing on individual companies. I then describe my research methods before setting out the results of my empirical study of the Carbon Majors' own statements. In the next Chapter, I then analyze how these results may help to establish the existence of a duty to respect human rights in the climate context.

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[191] *Ibid*. at 147

3.2 The role of private actors in the development of legal norms

In some circumstances the ethical practices adopted early by "progressive" corporations may be taken as blueprints for future legal duties to be imposed on their competitors.[192] Analyzing existing corporate practice can help to determine what future legal standards may entail. As I argued in Chapter 2, evidence shows that the growing international consensus around the corporate responsibility to respect human rights contained in the UNGPs has already led to the widespread adoption of those norms by corporations.[193] Corporate uptake of these norms has, in turn, led to courts taking those norms into account when determining whether a corporate defendant owed a duty to a particular class of plaintiffs. In the case of *Hudbay*, we have already seen the courts making use of human rights policies and impact assessments to determine whether there may be duty of care between a defendant corporation and plaintiffs whose human rights may be affected by their activities.[194] This judicial concern with the "voluntary" standards corporations set for themselves then reinforces the incentive for corporations to engage actively with emerging human rights and CSR norms, and increases the likelihood that their legal counsel will advise them to do so.[195] As one lawyer stated when interviewed on their approach to advising corporate clients around their responsibilities under the UNGPs: "Soft law can be hard law in waiting. The law is a lagging indicator of what is considered ethical, so what may be considered unethical today may be illegal tomorrow".[196] As some companies begin to respond to soft law standards, these responses may then inform how hard law standards are subsequently developed.

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[192] Regan and Hall, *supra* at note 92 at 2027
[193] See also WBCSD, *supra* at note 95
[194] *Hudbay*, *supra* at note 40; See discussion in Chapter 2 Section 2.2.3
[195] Regan and Hall, *supra* at note 92
[196] *ibid* at 2027

This process of mutual reinforcement is just one example of the way in which legal norms (whether hard or soft in nature) can both shape and be shaped by societal trends. As Nielsen has argued, "meanings, ideologies, rights, conceptions of rights, law, and social relationships are not static categories, but are continually being constructed, negotiated, altered, and resisted".[197] While this phenomenon is present in many areas of law, it is particularly evident in the field of international or transnational business governance, where norms are continually subject to a "recursive process" of "legal globalization that can be understood theoretically as sets of cycles that integrate global norm making and national lawmaking".[198] This process "involves ongoing exchange, contestation, negotiation, and revision of norms among the international, national, and local level."[199] As Halliday and Carruthers argued, internal regimes developed by corporations in response to statutory law – or in the case of the UNGPs in response to state-endorsed international norms – may ultimately become institutionalized through case law. Courtrooms may be the site of ongoing negotiation among experts about how norms can and should be implemented.[200]

Although something of a departure from traditional methods of legal research, empirical studies of corporate discourse around the responsibilities and norms set out in documents like the UNGPs may allow scholars to better understand how that discourse might influence the recursive process of norm development discussed above. As Shaffer has argued, empirical research has become

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[197] Laura Beth Nielsen, "The work of rights and the work rights do: A Critical Empirical Approach" in Austin Sarat (ed.) *Blackwell companion to Law and Society* (Oxford: Blackwell Publishing, 2004) 63-79 at 68

[198] Halliday and Carruthers, *supra* at note 23 at 1138

[199] Regan and Hall, *supra* at note 92

[200] Halliday and Carruthers, *supra* at note 23 at 1145

essential in the field of international law, in which the "interaction of institutional actors advancing different hard and soft law shapes law's development and meaning over time, and thus what the relevant law is at a particular time."[201] In line with the kind of critical, pragmatic, empiricism recommended by Shaffer, the aim of my study is to test rather than to assume the "normative valence" of the emerging norms around the responsibility to respect human rights and the need to anticipate and manage climate risks among the Carbon Majors.[202]

3.3 Existing understandings of the Carbon Majors' statements about climate risk and responsibility

In order to establish that the Carbon Majors owe a duty of care to conduct HRDD in the climate context, it is necessary to first establish that climate change – to which their activities have been proven to contribute – constitutes a significant "source of danger" to the rights of potential plaintiffs. The scientific consensus around the risks of climate change, expressed through successive reports from the IPCC, provides extensive evidence regarding the existence of such danger. However, as a growing body of literature has demonstrated, many of the Carbon Majors have in the past been highly successful in casting doubt on this scientific consensus, in some cases denying the existence of climate risk entirely.[203] Although this strategy initially proved extremely successful in delaying action on climate change, recent years have seen many companies moving

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[201] Gregory Shaffer, "The New Legal Realist Approach to International Law", (2015) 28:3 LJIL 189 at 205

[202] *ibid* at 207

[203] See for example Carroll Muffet et al., *Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis* (2017) Centre for International Environmental Law, online at: http://www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf (*last accessed October 4th, 2018*) ("Smoke and Fumes"); Geoffrey Supran and Naomi Oreskes, "Assessing ExxonMobil's climate change communications" (1977-2014), 2017 Environ. Res. Lett. 12 084019; Peter C Frumhoff, Richard Heede, Naomi Oreskes, "The Climate Responsibilities of Industrial Carbon Producers", Climatic Change (2015) 132: 157

away from this approach (at least publicly).[204] In this section, I briefly examine the existing literature on this issue before going on to explain how my own research examining the Carbon Majors' recent statements on climate risk, and their intersection with statements regarding human rights, both confirms and complements existing scholarship.

Much of the existing literature has focused on what the Carbon Majors knew about the risks of climate change, when they knew it, and what they did with that knowledge.[205] A recent study comparing ExxonMobil's internal and external communications on climate change between 1977 and 2014, for example, concluded that Exxon's public communications on anthropogenic global warming have been "misleading".[206] To date, most analyses have focused on in depth reviews of statements produced by individual corporations or industry groups based in the US. But as Muffet et al. have noted in a recent report synthesizing existing evidence about the knowledge of US based oil and gas companies, there is still more work to be done, particularly in exploring the knowledge and actions of corporations based outside the US.[207]

Debates about the Carbon Majors' role in spreading misinformation about climate science remain crucially important for a full understanding of these companies' moral responsibility in the climate

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[204] There is evidence that although these companies have shifted their public position on climate many industry funded think tanks and "experts" continue to cast doubt on climate science – see further Amy Westervelt. "Climate Denial Arguments Make Their Way to Federal Judge's Science Tutorial" (Climate Liability News, March 20, 2018) available online at: <https://www.climateliabilitynews.org/2018/03/20/climate-denial-william-alsup-liability/> (*last accessed October 7th, 2018)*

[205] See Muffet et al, *supra* at note 203

[206] Supran and Oreskes, *supra* at note 203

[207] Muffet et al, *supra* at note 203

context.[208] However Muffet and others have documented a number of recent developments suggest that many of the Carbon Majors may no longer be adopting an outright denialist approach to climate risk. The authors attribute this shift to the increasing difficulty of denying climate change as its effects are felt around the globe. They note that many of the Carbon Majors have now shifted their focus to questioning other aspects of the issue, and in particular the "economic feasibility" of mitigating emissions.[209]

This change in approach was recently demonstrated in a "Tutorial on Climate Science" held by the U.S. federal district court for the Northern District of California in early 2018.[210] The case concerned a claim in public nuisance brought by the City of Oakland against five of the Carbon Majors: BP, Chevron, Conoco Philips, Exxon Mobil and Royal Dutch Shell.[211] The city argued that as the five largest investor-owned fossil fuel producers in the world, the defendant companies should pay their share of the costs associated with responding to the impacts of sea-level rise on the city. During the course of the tutorial and in submissions filed afterwards, the defendants sought to cast doubt on the question of when the risks of dangerous climate science became known to them, but not on the question of whether those risks are known to them now.[212] In his final order

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[208] Shue, *supra* at note 8

[209] Muffet et al, *supra* at note 203 at 18

[210] *City of Oakland v BP PLC*, No. C 17-06011 WHA (N.D. Cal. Jul. 27, 2018) (Notice Re Tutorial), available online: < http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227_docket-317-cv-06011_notice.pdf> (*Last accessed September 8, 2018*) ("*Oakland v BP*")

[211] *Oakland v BP* (Amended Complaint of the Plaintiffs), available online: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180403_docket-317-cv-06011_complaint.pdf> (*Last accessed September 8, 2018*)

[212] See for example Chevron's presentation to the court, *Oakland v BP* (Presentation to the Court of the Second Defendant), available online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180321_docket-317-cv-06011_notice-2.pdf> (*Last accessed September 8, 2018*); For an analysis of the pleadings see Amy Westervelt, "Four More Oil Giants Acknowledge

following the tutorial, federal district judge William Alsup observed: "[t]he issue is not over science. All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so".[213] Instead, he determined that the issue was over what the appropriate response to those risks should be. This research aims to confirm that the approach adopted by the defendant companies in this case would also now be adopted by the rest of the Carbon Majors.

Recent research into the GHG reduction commitments made by corporations across different sectors and industries also confirms that even the fossil fuel industry has now accepted the existence of climate risk. One example of such research is provided by the work of the Carbon Disclosure Project (CDP), a UK based not-for profit organization that runs a global disclosure system to help companies manage, disclose, and ultimately reduce their GHG emissions.[214] The CDP was established in 2000 by a group of institutional investors, and the economic power of this group has led to a significant degree of engagement from corporations across a wide variety of sectors.[215] The CDP is now acknowledged to be the leading scheme for disclosure of emissions

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Climate Consensus to Federal Judge" (Climate Liability News, April 6 2018), available online at: <https://www.climateliabilitynews.org/2018/04/06/chevron-exxon-bp-shell-climate-consensus-liability/> (*last accessed September 8, 2018*)

[213] *Oakland v BP* (Order Granting Motion to Dismiss Amended Complaints at 6 [Order]), available online at: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180625_docket-317-cv-06011_order-2.pdf > (*last accessed September 8, 2018*)

[214] CDP, *About us*, online at: <https://www.cdp.net/en/info/about-us;> (*last accessed September 8, 2018*); DiSalvio and Dorata describe the CDP as "one of the major organizations bringing pressures for improved climate change disclosure" see Joan DiSalvio and Nina T. Dorata, "SEC Guidance on Climate Change Risk Disclosures: An Assessment of Firm and Market Responses", in Martin Freedman and Bikki Jaggi (ed.) *Accounting for the Environment: More Talk and Little Progress (Advances in Environmental Accounting & Management, Volume 5)*, (London: 2014, Emerald Group Publishing Limited), pp.115 - 130

[215] Florence Depoers, Jeanjean Thomas, and Jérôme Tiphaine *Voluntary Disclosure of Greenhouse Gas Emissions: Contrasting the Carbon Disclosure Project and Corporate Reports* (2016) 134:3 JBE at 448; See also Andrea Liesen et al. "Does stakeholder pressure influence corporate GHG emissions reporting? Empirical evidence from Europe" (2015) 28:7 AAAJ 1047; In more recent years, several national and supranational bodies have also

related data.[216] Following the Paris Agreement, the CDP began producing an annual report to assess how far corporate emissions reductions targets may take us to meeting the target of limiting warming to well below 2°C.[217] These reports, which include data submitted by many of the Carbon Majors, demonstrate that although corporate commitments to climate change mitigation still fall below the standards required to meet globally accepted emissions reductions targets, there is nonetheless an increasingly widespread recognition among corporations that they may be required to make such commitments.[218]

The empirical study included in this thesis adds to the approach adopted in this existing scholarship in a number of ways. Firstly, and most importantly, it focuses on questions about the Carbon Majors' understanding of their responsibility to respect human rights. While the potential for human rights arguments to inform questions of liability in climate damages cases is an issue noted by Muffet et al. there has not yet been a thorough academic investigation of the Carbon Majors' own positions on human rights outside the context of the PCHR inquiry.[219] Secondly, it examines what the Carbon Majors have said about climate adaptation and the responsibility to support communities around the world in climate adaptation efforts, instead of focusing on climate change

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developed mandatory GHG reporting schemes for large business enterprises, see further: Céline Kauffmann, Cristina Tébar Less and Dorothee Teichmann "Corporate Greenhouse Gas Emission Reporting: A Stocktaking of Government Schemes", (2012), OECD Working Papers on International Investment, 2012/01, OECD Publishing.

[216] Depoers et al, *supra* at note 215

[217] CDP, "Out of the starting blocks: Tracking progress on corporate climate action" October 2016 at 9, available online at <https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/001/228/original/CDP_Climate_Change_Report_2016.pdf?1485276095> (*last accessed August 13, 2018*).

[218] *ibid.* at 23

[219] Muffet et al, *supra* at note 205 at 5-6

mitigation commitments (i.e. commitments to GHG emissions reduction). Thirdly, in looking at statements about climate risk, it focuses on whether recent statements by the Carbon Majors demonstrate agreement with the "universal consensus around dangerous climate change" discussed by Cox, rather than focusing on past communications. In doing so, it aims to develop a more horizontal picture of the approach taken by the non-state-owned Carbon Majors to responsibility in the climate context than is currently available. This horizontal approach will allow me to determine whether there is now a consensus among the Carbon Majors around the existence of climate risk. It will also allow me to determine where there are differences in the standards of responsibility accepted between corporations and across geographic boundaries, and to determine which of these corporations may be seen as leaders and which may be seen as laggards in the areas of human rights and climate responsibility.[220]

3.4 Methods

3.4.1 Research questions

In his analysis of the duty of care in *Urgenda*, Cox identified two normative assumptions underlying the duty of care imposed on the Netherlands: the consensus around the foreseeable risks associated with climate change and the acknowledged responsibility of states to address those risks. Two parallel assumptions underlie the duty of care to respect human rights in the climate context. The first assumption is that businesses including the Carbon Majors know or ought to

[220] As Hunter and Salzman have argued, industry standards constantly evolve as new technologies and societal expectations become relevant. A comparison between industry leaders and laggards may sometimes provide evidence that the conduct of laggards falls below a reasonable expected standard of care. See Hunter and Salzman, *supra* at note 15 at 1777

know that there are foreseeable physical risks associated with climate change, and that those risks have been described as "the greatest human rights challenge of our time".[221] The second is that there is now a clear consensus that businesses including the Carbon Majors have a responsibility to respect human rights, and to conduct HRDD to identify and prevent, mitigate or remediate any human rights impacts that might arise from their activities. In order to determine what the Carbon Majors have said about their responsibility to investigate and remediate climate related human rights harms, I sought to answer the following research questions:

1. How many of the Carbon Majors have made public commitments to respecting human rights and how strong are those commitments?
2. Of the Carbon Majors who acknowledge a responsibility to respect human rights, how many acknowledge that this responsibility extends to environmental rights impacts and in particular to the impacts of climate change?
3. How many of the Carbon Majors currently accept the reality of the physical risks caused by climate change?
4. Of the Carbon Majors who accept this reality, how many acknowledge the risks to third parties and a responsibility to assist those third parties in climate adaptation efforts?

3.4.2 Hypothesis

Before conducting this study, I developed the hypothesis that some – though by no means all – of the Carbon Majors would have made public statements acknowledging their responsibility to respect human rights. In large part, this hypothesis was based on research into the PCHR

[221] Mary Robinson, *supra* at note 21

investigation, discussed above.[222] In the face of this investigation, the majority of these corporations have simply remained silent.[223] Others have responded challenging the Commission's jurisdiction.[224] A small minority, however, have responded by referring to their existing human rights statements or policies, climate change position statements, participation in voluntary reporting or CSR schemes, and other CSR documents. BHP Billiton, for example, responded to the Commission by noting that:

> "BHP Billiton's significant long-term presence in the countries where we operate brings with it the opportunity to contribute positively to the achievement of human rights and the responsibility to effectively prevent and mitigate human rights-related risks. We take our human rights obligations very seriously and demonstrate this by committing to operate in accordance with the United Nations (UN) Universal Declaration of Human Rights and aligning our approach with the UN Guiding Principles on Business and Human Rights."[225]

In addition to laying out the corporation's position on human rights, BHP Billiton's response to the Commission's investigation also notes that:

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[222] See Chapter 2 Section 2.4.3

[223] In this thesis, I have considered a corporation as remaining silent when it has neither responded directly to the PCHR or to requests for comment on the investigation submitted by the Business and Human Rights Resource Centre, a UK based non-profit. See *In re Greenpeace Southeast Asia & Ors*. (Petitioners Consolidated Reply, Annex A: List of respondents that submitted answers, comments, and statements to the Petitioners, the Commission on Human Rights of the Philippines (CHR) and/or Business and Human Rights Resource Centre (BHRRC), February, 2017), online at: <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-Reply/Annex_A_Overview_of_Corporate_Responses.pdf> (*last accessed October 5th, 2018*)

[224] See for example, Peabody Energy, *Special Appearance and Motion to Dismiss In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People* (2016) online at: <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate_Responses_and_Comments/Peabody_Response.pdf> (*last accessed September 7th, 2018*)

[225] BHP Billiton, *Response re Commission on Human Rights of the Philippines: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People*, (2016), available online at: <https://www.business-humanrights.org/sites/default/files/documents/20160908%20Philippines%20CHR%20Petition%20BHP%20Billiton%20ResponseFinal%28002Statement%29.pdf> (*last accessed September 7th, 2018*)

> "As a major producer and consumer of fossil fuels, we recognise our **responsibility** to take action by focusing on reducing our own greenhouse gas (GHG) emissions, increasing our preparedness for physical climate impacts and working with others, including academia, industry and governments, **to enhance the global response** to climate change."[226]

The response goes on to discuss the work BHP Billiton is currently engaged in both to reduce emissions and to support the efforts of communities' around the world to adapt to the physical impacts of climate change. BHP Billiton's statements in response to the Commission's investigation are among the most comprehensive in acknowledging the corporation's responsibilities in respect of climate change.[227] However, on the basis of these statements I developed the hypothesis that if some corporations were willing to acknowledge their responsibilities even in the face of the PCHR's investigation, then more might do so in other, less controversial contexts.

3.4.3 Data gathering

Following the lead of the PCHR inquiry, I took the full group of non-state-owned Carbon Majors as the population for my study.[228] Based on Richard Heede's original *Carbon Majors* research, the petition to the PCHR listed fifty corporations as belonging to the group of non-state-owned Carbon

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[226] *ibid* (emphasis added)

[227] BHP Billiton is one of only five companies who directly acknowledged the responsibility to respect human rights in their response to the Commission. The other four companies who appear to acknowledge the responsibility to respect human rights in their responses to the Commission or the BHRRC are BP, Rio Tinto, Repsol, and Freeport-McMoRan.

[228] Many of the entities identified in Heede's original Carbon Majors research are state-owned. Since a different approach to human rights norms and standards may be applicable to state-owned entities these entities have not been included in this study. For further details on these state-owned entities see Heede, *supra* at note 6. For further details on the different norms that may be applicable to state-owned entities see Principle 4 of the UNGPs on the State-Business Nexus and associated commentary, UNGPs, *supra* at note 17

Majors. The full list as it was included in the petition is reproduced below in Table 1.[229] In the original petition, the petitioners noted that two of the companies – Yukos Oil Company and Cyprus Amax Minerals Company – were no longer extant at the time that the petition was submitted.[230] Most of the assets of Cyprus Amax Minerals Company were transferred to Freeport-McMoran, which has responded to the PCHR investigation.[231] Many of Yukos Oil Company's assets were transferred to Rosneft, which is now being counted among the respondents to the PCHR petition.[232] Over the past few years, there have also been a number of mergers and acquisitions not mentioned in the petition that have affected the corporations in the original list and as a result there are now 43 corporations under investigation by the PCHR.[233]

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[229] See PCHR petition, *supra* at note 161 at 4

[230] *ibid.*

[231] See Freeport-McMoRan, Response to the BHRRC, available online at: <https://www.business-humanrights.org/sites/default/files/documents/Response%20to%20Business%20and%20Human%20Rights%20Resource%20Centre%20-%20Commission%20of%20Human%20Rights%20of%20the%20Philippines%20-%2010.pdf> (*last accessed, September 7, 2018*)

[232] See Petitioners Consolidated Reply, *supra* at note 223; The Russian state is currently the largest investor in Rosneft and it could therefore be considered to be state-owned. Nonetheless, I have taken the decision to leave it include it in this study on the basis of the PCHR petition. See further Rosneft, "Rosneft at a glance", online at: < https://www.rosneft.com/about/Rosneft_today/> (*last accessed September 7, 2018*)

[233] Two of the respondent corporations Lafarge and Holcim have merged to form LafargeHolcim. Italcimenti has been acquired by Heidelberg Cement. Talisman Energy has been acquired by Repsol. BG Group has been acquired by Shell. Massey Energy has been acquired by Alpha Natural Resources. Canadian company Nexen has been acquired by China's state-owned CNOOC and is therefore no longer included in the list of investor-owned Carbon Majors. See LafargeHolcim, *History of LafargeHolcim,* online at: <https://www.lafargeholcim.com/our-history;> (Last accessed September 7, 2018); Heidelberg Cement, *Acquisition of Italcementi finalized – new Board of Directors established* (Press Release, 2016), online at: <https://www.heidelbergcement.com/en/pr-20-10-2016;> *(last accessed September 7, 2018);* Repsol, *Welcome to Repsol Oil & Gas Canada Inc. Formerly Known As Talisman Energy Inc.,* online at: <*http://www.talisman-energy.com;>* *(last accessed September 7, 2018);* Ron Bousso, *Shell pursues transition plan after sealing $53 billion BG deal,* (Reuters, 2016) online at: < https://www.reuters.com/article/us-bg-m-a-shell-idUSKCN0VO0YJ;> *(last accessed September 7, 2018);* Steve James, *Alpha completes Massey Acquisition*, (Reuters, 2011) online at <https://www.reuters.com/article/us-massey-alphanatural/alpha-completes-massey-acquisition-idUSTRE7504CL20110601> *(last accessed September 7, 2018);* Euan Rocha, *CNOOC closes $15.1 billion acquisition of Canada's Nexen* (Reuters, 2013) online at: https://www.reuters.com/article/us-nexen-cnooc/cnooc-closes-15-1-billion-acquisition-of-canadas-nexen-idUSBRE91O1A420130225 *(last accessed September 7, 2018);*

Table 1: Non-state-owned Carbon Majors listed in PCHR petition

Entity	2010 emissions $MtCO_2e$	Cumulative $MtCO_2e$	% cumulative global, 1751-2010
1. Chevron, USA	423	51,096	3.52%
2. ExxonMobil, USA	655	46,672	3.22%
3. BP, UK	554	35,837	2.47%
4. Royal Dutch Shell, Netherlands	478	30,751	2.12%
5. ConocoPhillips, USA	359	16,866	1.16%
6. Peabody Energy, USA	519	12,432	0.86%
7. Total, France	398	11,911	0.82%
8. Consol Energy, Inc., USA	160	9,096	0.63%
9. BHP Billiton, Australia	320	7,606	0.52%
10. Anglo American, UK	242	7,242	0.50%
11. RWE, Germany	148	6,843	0.47%
12. ENI, Italy	258	5,973	0.41%
13. Rio Tinto, UK	161	5,961	0.41%
14. Arch Coal, USA	341	5,888	0.41%
15. Anadarko, USA	96	5,195	0.36%
16. Occidental, USA	109	5,063	0.35%
17. Lukoil, Russian Federation	322	3,873	0.27%
18. Sasol, South Africa	113	3,515	0.24%
19. Repsol, Spain	126	3,381	0.23%
20. Marathon, USA	59	2,985	0.21%
21. Yukos, Russian Federation *	-	2,858	0.20%
22. Hess, USA	61	2,364	0.16%
23. Xstrata, Switzerland	214	2,223	0.15%
24. Massey Energy, USA	91	2,199	0.15%
25. Alpha Natural Resources, USA	182	2,149	0.15%
26. Cyprus Amax, USA *	-	1,748	0.12%
27. EnCana, Canada	84	1,695	0.12%
28. Devon Energy, USA	93	1,690	0.12%
29. BG Group, UK	97	1,543	0.11%
30. Westmoreland Mining, USA	46	1,530	0.11%
31. Suncor, Canada	89	1,407	0.10%
32. Kiewit Mining, USA	59	1,295	0.09%
33. North American Coal, USA	40	1,181	0.08%
34. Ruhrkohle AG, Germany	-	1,138	0.08%
35. Luminant, USA	33	1,049	0.07%
36. Lafarge, France	61	1,044	0.07%
37. Holcim, Switzerland	62	1,008	0.07%
38. Canadian Natural Resources	93	958	0.07%
39. Apache, USA	97	951	0.07%
40. Talisman, Canada	62	925	0.06%
41. Murray Coal, USA	59	796	0.05%
42. UK Coal, UK	19	794	0.05%
43. Husky Energy, Canada	42	665	0.05%
44. Nexen, Canada	36	651	0.04%
45. HeidelbergCement, Germany	31	587	0.04%
46. Cemex, Mexico	27	551	0.04%
47. Italcimenti, Italy	24	463	0.03%
48. Murphy Oil, USA	27	418	0.03%
49. Taiheiyo, Japan	10	402	0.03%
50. OMV Group, Austria	45	346	0.02%
Total:	**7,628**	**314,811**	**21.71%**

Right column compares each entity's cumulative emissions to CDIAC's global emissions 1751-2010.
* not extant; production and emission quantified for these entities but not attributed to extant entities.

As Michelon et al have noted "Growing and widespread interest in corporate social responsibility (CSR) has helped generate the diffusion of a broad set of CSR activities by firms of all types."[234] It is increasingly common practice for firms to issue "stand-alone" CSR or sustainability reports to be read alongside their annual financial reports.[235] It is also increasingly common for firms to engage with reporting frameworks such as the Global Reporting Index (GRI) in their CSR disclosure practices, as well as engaging with issue specific disclosure schemes like the CDP reporting process discussed above. For this study, I gathered documents from four key sources of CSR statements and reporting: the Carbon Majors' own websites; the GRI's Sustainability Disclosure Database; reports to the Carbon Disclosure Project; and annual reports to the US Securities and Exchange Commission.[236]

I began my search with each of the Carbon Majors' own websites, since this is the one source of information that exists for all 44 corporations. I looked for webpages which contained the phrase "human rights" and webpages which contained references to climate change or emissions reductions strategies. I also downloaded each corporation's most recent "stand-alone" sustainability or CSR report and any dedicated human rights policy or positions statement.[237]

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[234] Giovanna Michelon et al, "CSR reporting practices and the quality of disclosure: An empirical analysis" (2015) 33 CPA at 59, available online <https://www.sciencedirect.com/science/article/pii/S1045235414001051> (*last accessed August 17, 2018*)

[235] *ibid*

[236] See Appendix A for a full list of sources identified and review for each corporation.

[237] There is a general trend towards the production of annual CSR reports, but there is often a significant time lag in the publication of these reports. Many of the most recent reports available at the beginning of summer 2018 were reports that concerned data and company practices from 2016. While I have included any report concerning data from this period I have excluded reports from 2015 or earlier in light of the shift in the global debate following the

In addition to looking on the corporations' own websites, I conducted a search by corporation for any recent reports held in the GRI's Sustainability Disclosure Database. The GRI describes itself as "an independent international organization that has pioneered sustainability reporting since 1997".[238] It has developed a set of sustainability reporting standards, which are relevant to both climate risk and human rights.[239] As Michelon et al note, the GRI "is widely acknowledged as a leader in the international standardization of sustainability reporting" and studies have shown that firms engaging with the GRI "appear to have higher levels of commitment to CSR than do firm that do not follow it."[240] The Sustainability Disclosure Database contains nearly 50,000 reports from over 12,000 organizations.[241] The information in the database comes from two sources: reports may be uploaded directly by the reporting organization (i.e. the company) or they may be submitted through the GRI's "Data Partners" who work in close partnership with companies and are described by the GRI as the "first point of contact for registering a new sustainability or integrated report".[242] Not all reports included in the database are written in accordance with the GRI's reporting guidelines.[243]

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negotiation of the Paris Agreement during that year. I have included human rights policies and position statements from before 2015 in the analysis since these policies are not updated on an annual basis as a general rule.

[238] GRI, *About GRI*, available online at: <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> (*last accessed September 7, 2018*)

[239] GRI, *Consolidated Set of GRI Sustainability Reporting Standards 2016*, available online at: <https://www.globalreporting.org/standards> (*last accessed September 7, 2018*)

[240] Michelon, *supra* at note 234

[241] The database can be accessed online at: <http://database.globalreporting.org.> (*last accessed September 7, 2018)*

[242] GRI, "GRI Data Partners" available online at: <https://www.globalreporting.org/services/Communication/Sustainability_Disclosure_Database/GRI-Data-Partners/Pages/GRI-Data-Partners.aspx> (*last accessed September 7, 2018)*

[243] In March 2018 the GRI introduced the GRI Standards Report Registration System, which allowed the GRI to confirm details of reports which claim to have been developed in accordance with the GRI standards. Some reports were removed from the database pending confirmation of report details. As my search was conducted in June 2018,

In addition to looking for reports in the Sustainability Disclosure Database, I looked at whether each of the Carbon Majors had submitted a report to the CDP. As discussed above, the CDP is an investor driven reporting scheme which asks corporations to measure and disclose GHG emissions and to describe their emissions management strategies. Among the questions asked by the CDP reporting questionnaire are questions relating to the risks and opportunities presented by climate change. This includes questions about physical risks caused by climate change, which are of particular relevance for this study.[244]

Finally, I also examined each corporations' most recent annual report to the US Securities and Exchange Commission (SEC).[245] In 2010, the SEC published interpretative guidance "to remind companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and provided to investors."[246] The guidance created "authoritative requirements" for climate risk disclosure.[247] I anticipated that the mandatory nature of SEC reports for all companies traded on the New York Stock Exchange might mean that even some corporations who did not engage with

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it is possible that some of the corporations for whom I did not find reports in the database had had their reports removed pending the outcome of this process.

[244] See CDP, *CDP Climate Change Questionnaire Preview and Reporting Guidance 2018 - Version Control* (Feb 7, 2018), available online at: <https://guidance.cdp.net/en/guidance?cid=2&ctype=theme&idtype=ThemeID&incchild=1&microsite=0&otype=Questionnaire&tags=TAG-646%2CTAG-605%2CTAG-600.> (*last accessed September 7, 2018*). The CDP's Guidance is regularly updated so the precise wording of questions relating to physical risk varies depending on the year of reporting, but questions relating to physical risk are included in all questionnaires from 2015 onwards.

[245] The type of annual report required by the SEC varies depending on the location of domicile of the corporation. For this study, I have considered reports issued on Form 10-K by domestic corporations, Form 20-F by foreign private issuers, and Form 40-F for corporations domiciled in Canada.

[246] Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change* (2 Feb, 2010) at 27, online at: https://www.sec.gov/rules/interp/2010/33-9106.pdf (*last accessed September 7 2018*)

[247] DiSalvio and Dorata, *supra* at note 215

voluntary disclosure schemes or provide information about their position on climate on their own websites might have included relevant statement in reports to the SEC.[248]

3.4.4 Data analysis

After identifying the relevant sources of data for each corporation as outlined above, I conducted a content analysis of the documents. I then supplemented the results of this content analysis with a close-reading of sections of text which seemed particularly relevant to the questions of legal and moral responsibility for climate related human rights harms to help contextualize the results of the study.

3.4.4.1 Human rights data

In order to test my hypothesis that at least some public statements by the Carbon Majors would have acknowledged the responsibility to respect human rights under the UNGPs, I designed an *a priori* coding scheme to identify each reference to human rights in the documents gathered and to measure the strength of the commitment made by each company. This coding scheme was based on Principle 15 of the UNGPs, which sets out the basic requirements for the responsibility to respect as follows:

> *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:*
>
> *(a) A policy commitment to meet their responsibility to respect human rights;*

[248] Since annual reports are required by the SEC, I only included reports for the year ending December 31st, 2017 in my study to allow for the fairest comparison between companies.

> *(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;*
>
> *(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.*[249]

I coded each reference to human rights with "human rights" followed by the letters A, B, or C, depending on whether the document referred to each of the elements of Principle 15. Where 2 or more elements of Principle 15 were referred to in the same sentence or paragraph I coded this section of the text with all relevant letters.

Since the individual company formed my ultimate unit of analysis, I then reviewed the codes for all the documents related to a given corporation before coding the corporation with the code Human Rights 1, Human Rights 2 or Human Rights 3, depending on how many of the elements of Principle 15 were present across the various documents or statements analyzed. I used the number of elements included to determine whether the company could be said to have a strong, moderate, or weak commitment to human rights. Where a corporations' discussion of human rights included any reference to environmental rights, I also coded the document with the code "environmental rights".

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[249] UNGPS, *supra* at note 17 at 15

3.4.4.2 Climate risk data

My aim in conducting a content analysis of messages relevant to climate risk was to test the theory that the Carbon Majors would have made statements acknowledging the need to anticipate the serious physical risks associated with climate change. In some cases, however, corporations made references to climate risk or the challenges posed by climate change which appeared to be more concerned with the impact of changes to demand for fossil fuels on the corporation's own business than with physical risks to either the corporation or to third parties.[250] In light of this distinction I developed two sets of codes, one for "climate risk" and one specific to "physical risk". I applied the first code to any mention of climate risks and challenges. I applied the latter code to any statement that described the physical impacts of climate change. I also assigned codes to the documents depending on the type of physical risk identified, e.g. "cyclones", "extreme weather", and "sea level rise". I also coded the documents based on references to "adaptation", "third party risk", and "community adaptation".

3.4.5 Limitations

This study can only begin to scratch the surface of the position taken by each of the Carbon Majors on these issues. I have focused on a top level, horizontal analysis across the wider population of corporations, in line with my aim of assessing whether there is a broad consensus among the

[250] Arch Coal for example, notes "The demand for our products or our securities, as well as the number and quantity of viable financing alternatives, may be significantly impacted by increased governmental regulations and unfavorable lending and investment policies by financial institutions and insurance companies associated with concerns about environmental impacts of coal combustion, including perceived impacts on the global climate." See Arch Coal, "Form 10-K Annual Report to the SEC" (2018), available online at < https://www.sec.gov/Archives/edgar/data/1037676/000162828018002109/0001628280-18-002109-index.htm> (*last accessed August 17, 2018*)

Carbon Majors around the underlying norms on which the duty of care proposed in this thesis is based. It is likely that there are also other documents and statements made by each corporation relevant to this question, which it is beyond the scope of this research to gather and analyze.

It is also worth noting that due to limitations of time I have not been able to conduct a detailed analysis of every company's individual understanding of the scope of the responsibility to respect human rights, and the classes of person to whom this responsibility is owed. The commentary to the UNGPs notes that: "Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights."[251] As I will discuss further below, many of the Carbon Majors framed their commitment to respecting human rights as reflecting the requirements of the UNGPs. Several companies also explicit reference to international instruments like the UN Declaration on Human Rights to define the scope of this commitment. These findings suggest that many of these companies accept a broad responsibility for respecting a wide range of human rights, including civil and political rights. As I will also discuss further below, the idea that these companies are construing scope of the responsibility to respect human rights broadly is also supported by the relatively high level of commitment to environmental rights expressed by some of these companies.[252] Nevertheless, there may still be companies whose understanding of these

[251] UNGPs, *supra* at note 17 at 13

[252] As McPhail and Adams noted following a 2016 analysis of the human rights language adopted by a number of major fortune 500 companies, language directly accepting the existence of environmental rights in some cases may even suggest that corporations are extending their definition of human rights beyond the rights recognized in the International Bill of Rights, which does not expressly mention a right to a safe environment. See Ken McPhail and Carol A Adams "Corporate respect for human rights: meaning, scope, and the shifting order of discourse" (2016) 29:4 AAAJ at 650

commitments, would, on a much closer reading appear more limited. This potential limitation could affect the degree to which some of the Carbon Majors' statements regarding respect for human rights can be taken as relevant in the climate context.

In order to conduct this analysis, I have at times had to rely heavily on the word search functions of various websites and programs. It is therefore possible that I have missed some documents during the data gathering phase, or that I missed some relevant references in the text during the data analysis phase. These problems may also have been exacerbated by the wide variety of documents and statements collected and analyzed during the course of this study, since no two corporations' websites look alike. Nonetheless, given the wide range of sources reviewed for each company I am confident that this exercise has allowed me to develop a relatively accurate understanding of the position of each of the Carbon Majors on the questions of human rights responsibility and climate risk. As such, it is a necessary first step towards understanding the position of each corporation more fully.

In conducting my analysis, I have striven to ensure that my results are as valid and reliable as possible. The validity of many content analyses has been a subject of criticism in recent years.[253] However, as Rourke and Andersen have argued, these criticisms largely apply to studies which attempt to draw inferential conclusions from a quantitative content analysis, rather than those that simply create a tally of when and where a certain type of message appears in a text or group of

[253] Liam Rourke and Terry Anderson, Validity in Quantitative Content Analysis, (2004) 52: 1 ETR&D 15

texts.[254] This study is principally in the latter group of analyses in that it largely focuses on identifying when a particular type of message occurs in a group of texts and therefore avoid the bulk of this criticism. Where I do seek to draw inferences – for example inferences about the strength of a given corporation's commitment to human rights – I have sought to ground the basis for drawing these inferences firmly in the UN Guiding Principles and to be as transparent as possible about my approach. The reliability of my research may nevertheless be limited by the fact that it has been conducted by a single researcher. Neuendorf argues that content analysis should ideally be conducted by a team of researchers so that tests for inter-coder reliability can be applied to determine whether different researchers would have applied the same codes to each document.[255]

3.5 Results

3.5.1 Introduction

This section sets out the results of my research. Sub-sections 3.5.2 and 3.5.3 set out the responses to my first two research questions:

1. How many of the Carbon Majors have made public commitments to respecting human rights and how strong are those commitments?

2. Of the Carbon Majors who acknowledge a responsibility to respect human rights, how many acknowledge that this responsibility extends to environmental rights impacts and in particular to the impacts of climate change?

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[254] *Ibid.*

[255] Kimberley A. Neuendorf, The Content Analysis Guidebook, (Thousand Oaks California: Sage, 2002)

The results in these sections show that there is overwhelming acceptance of the responsibility to respect human rights among the Carbon Majors, and that many of these companies claim to have already developed HRDD processes for implementing that responsibility.[256] The results also detail the ways in which a number of companies claim to have started to extend these HRDD processes to environmental impacts. In the next Chapter of this thesis, I argue that these claims could help climate accountability plaintiffs to establish that the Carbon Majors had some degree of responsibility and control in respect of climate related human rights harms. This could form the basis for a duty of care. I also argue that these existing processes could provide blueprints for the extension of existing HRDD processes to the climate context, providing guidance on what the standard of care required to discharge such a duty might be.

Although only one company made an explicit connection between climate change and human rights in the documents I reviewed, I did find a number of statements by corporations that reveal that they are deeply engaged in the debate around the application of human rights norms and standards to environmental issues. These statements are discussed in sub-section 3.5.4. As I will discuss further in Chapter 4, this deep engagement with the ongoing international debate about the connection between human rights and the environment strengthens the expectation that the Carbon Majors should be actively engaging in the development of HRDD processes to identify and address climate related harms.

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[256] It should be noted that there may be a significant gap between corporate statements claiming to have adopted HRDD processes and such processes being adequately and effectively implemented. As Mccorquodale et al. have noted there are a number of different factors which impact how effective HRDD processes adopted by different companies appear to be in identifying and remediating human rights impacts, and there are real question marks about whether human rights policies developed by company headquarters are actually being adopted and followed throughout a company's operations. See Mccorquodale et al, *supra* at note 91

Sub-sections 3.5.5 and 3.5.6 set out the responses to my third and fourth research questions:

> 3) How many of the Carbon Majors currently accept the reality of the physical risks caused by climate change?
>
> 4) Of the Carbon Majors who accept this reality, how many acknowledge the risks to third parties and a responsibility to assist those third parties in climate adaptation efforts?

The results described in these sections show that the overwhelming majority of the Carbon Majors do now accept the existence of a broad range of risks associated with climate change. A smaller but still significant number have also made public statements recognizing how these risks affect third parties. In some cases, the Carbon Majors are already accepting some degree of responsibility for supporting adaptation efforts to help these third-party communities. The results of this study therefore confirm what the evidence of the *Oakland* case suggests: even among the Carbon Majors, the debate is no longer about whether climate change poses a threat – it is about how that threat should be managed. In Chapter 4, I argue that this recognition of the threat of climate change among the large majority of the Carbon Majors suggests that climate accountability plaintiffs can now easily meet the test of foreseeability in establishing a duty of care.

Although the results of this study do show an overwhelming degree of consensus among the Carbon Majors, they also confirm the existence of a group of outliers in the US who have yet to accept the existence of climate risk and the responsibility to respect human rights. Sub-section 3.5.7 outlines my research findings on this issue, and in Chapter 4, I analyze what these findings might mean for climate accountability plaintiffs seeking to identify strategic jurisdictions for litigation.

3.5.2 Recognition of the responsibility to respect human rights and HRDD

The results of this study demonstrate that 72% (31 out of 43) of the Carbon Majors now recognize the responsibility to respect human rights. More than half of these companies (17 out of 31) showed a strong commitment to human rights. 53% (23 out of 43) of all the companies reviewed mentioned some form of HRDD or human rights impact assessment process in the documents and statements reviewed for this study. A full breakdown of each company's level of commitment to human rights is displayed in Table 2. Figure 1 demonstrates the proportion of companies showing each level of commitment.[257]

Table 2: breakdown of commitment to human rights by company

Strong Commitment	**Medium Commitment**	**Weak Commitment**	**No Commitment**
Chevron (USA)*	**Anadarko (USA)**	Peabody Energy (USA)	Consol Energy Inc (USA)
ExxonMobil (USA)			Arch Coal (USA)
BP (UK)*	**Sasol (South Africa)***	RWE (Germany)	

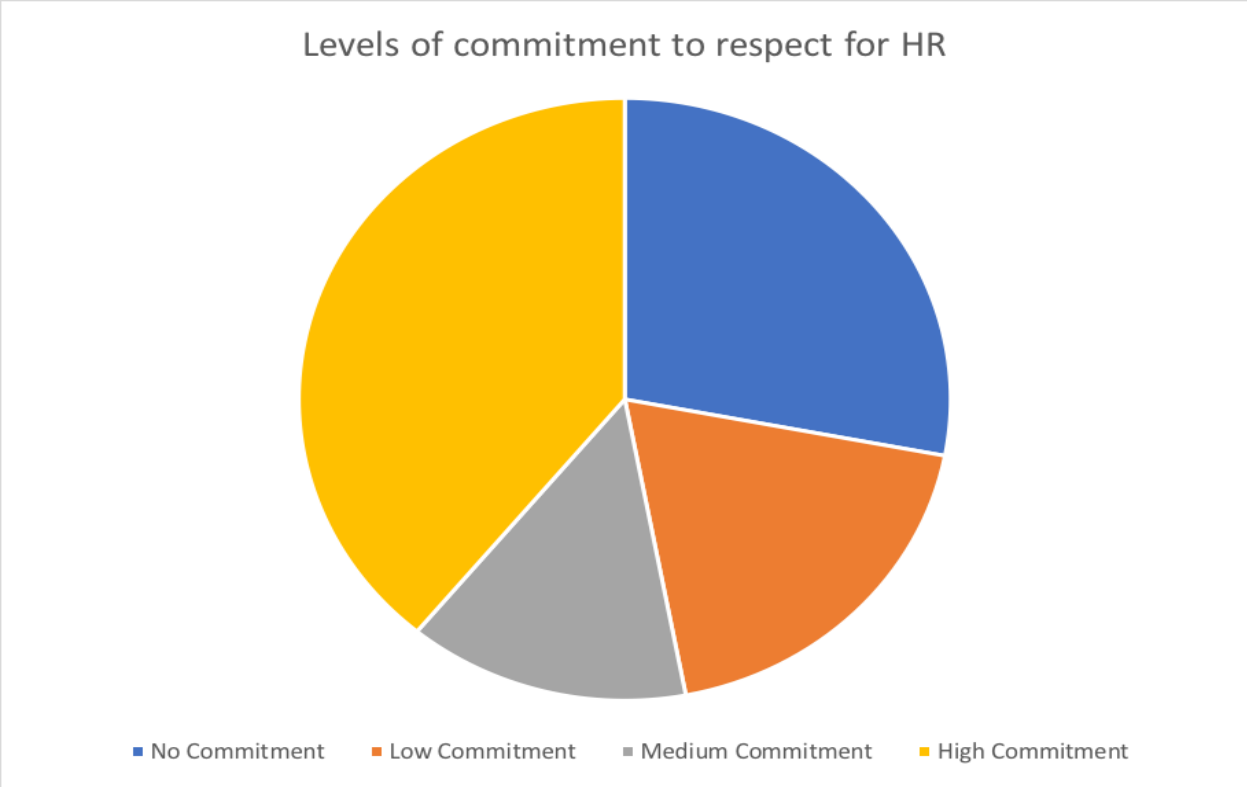
[257] It is important to note that although the results of this study show a strong consensus around the responsibility to respect human rights among the Carbon Majors, this should not necessarily be taken as evidence that this responsibility is being fully and rigorously implemented. In a report from 2017, Glencore for example notes that although 1,063 complaints had been submitted through its human rights grievance procedures it had found "zero serious human rights incidents" to have occurred as a result of its activities. Although it is certainly possible that not one of the thousand complaints submitted was "serious" these figures suggest that a degree of skepticism about companies' self-reporting procedures is required. See Glencore, Sustainability Report 2017, at 11 and 50. Available online at: <http://www.glencore.com/dam/jcr:f3e8dd81-97b4-4b96-925c-ab3b6ea13c4a/Glencore%20Sustainability%20Report%20FINAL%202.pdf> (*last accessed August 17, 2018*)

Strong Commitment	Medium Commitment	Weak Commitment	No Commitment
Royal Dutch Shell (Netherlands)*	**Hess (USA)***	Occidental (USA)	Alpha Natural Resources (USA)
ConocoPhilips (USA)	**Husky Energy (Canada)**	Lukoil (Russia)	EnCana (Canada)
Total (France)	**Heidelberg Cement (Germany)***	Marathon (USA)	Devon Energy (USA)
BHP Billiton (Australia)	**OMV Group (Austria)**	Rosneft (Russia)	Westmoreland Mining (USA)
Anglo American (UK)*		Canadian Natural Resources (Canada)	Kiewit Mining (USA)
ENI (Italy)*		Taiheyo (Japan)	North American Coal (USA)
Rio Tinto (UK)*			RAG AG (Germany)
Repsol (Spain)			Luminant (USA)
Glencore (Switzerland)*			Murray Coal (USA)
Freeport-McMoran (USA)*			Murphy Oil (USA)
Suncor (Canada)			
LafargeHolcim (Switzerland)*			
Apache (USA)			

Strong Commitment	Medium Commitment	Weak Commitment	No Commitment
Cemex (Mexico)*			

Key: Corporations whose statements demonstrated an express commitment to human rights due diligence are displayed in bold. Corporations whose statements made a connection between human rights and the environment have been marked with a star.

Figure 1: levels of commitment to respect for human rights



3.5.3 Respecting environmental rights and remedying environmental impacts

Thirteen of the companies analyzed made a connection between human rights and the environment in their policies, statements or reports (see Table 2 for details). These companies make up 30% of

the total population of companies included in this study, but 41% of the companies who demonstrated some commitment to human rights.

Heidelberg Cement was the only corporation to make an explicit reference to climate change in its human rights policy. The policy lists "[e]nvironment, **climate** and biodiversity" as one of three priority areas.[258] To explain this priority, the company notes: "[w]e support initiatives dealing with the most important **environmental consequences of our business activity**."[259] Not only does this statement suggest that the company acknowledges a connection between human rights and climate change, it also contains an acknowledgment that the corporations' own contributions to climate change create a responsibility to address the consequences of those contributions.

Although Heidelberg is alone in specifically acknowledging a connection between human rights and climate change, it is by no means the only company to have acknowledged the need to remediate environmental rights impacts created by its activities. In its GRI report for 2016, Glencore, for example, describes the development of "grievance mechanism programmes…focused on ensuring alignment with the UN Guiding Principles (UNGPs)."[260] The report goes on to note that the corporation received 963 complaints through these grievance

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[258] Heidelberg Cement, "Human Rights Position Statement of the Heidelberg Cement Group" (December 2017) at 4, available online at < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj-qKvlk_XcAhWdHjQIHdFQAHIQFjAAegQIAhAC&url=https%3A%2F%2Fwww.heidelbergcement.com%2Fen%2Fsystem%2Ffiles_force%2Fassets%2Fdocument%2Fef%2F1a%2Fhuman_rights_position_heidelbergcement_en.pdf%3Fdownload%3D1&usg=AOvVaw3sYHr5n-3imAO7OpkA0wKr> (*last accessed August 17, 2018*) (emphasis added)

[259] *ibid*

[260] Glencore, "Sustainability Report 2016" (2017) at 41 available online at < http://database.globalreporting.org/reports/57828/> (*last accessed August 17, 2018*)

mechanisms in 2016, nearly all of which had an environmental component.[261] In a case study of these grievance mechanisms in action, Glencore describes receiving 54 complaints from members of the local community living near one of its assets regarding flood damage from heavy rains. The corporation acknowledges that the damage was "connected to the infrastructure and roads for some of our projects".[262] Glencore investigated the complaints, found 44 of them to be valid and provided compensation accordingly. The company also detailed proactive measures, including "undertaking further civil works", aimed at preventing similar damage from occurring during the next rainy season.[263] This case study provides a clear example of a corporation applying HRDD to environmental rights impacts that have been exacerbated by its activities.

In its 2016 sustainability report, Freeport-McMoran (Freeport) included a whole section entitled "Environment" in its "Human Rights Impact Assessment Dashboard".[264] The topics assessed under this heading were: pollution, water security, waste and hazardous materials management, and increased exposure to natural hazards.[265] Other topics in the "Dashboard" also include the impacts of Freeport's operations on the community and third parties, which include impacts on community health and safety, impacts on economic livelihoods, and displacement and resettlement.[266] Freeport notes that the topics selected "have been mapped against recognized international human rights to

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[261] *ibid*. The report makes no mention of complaints associated with climate change specifically, but does identify complaints associated with air quality and emissions as the second most common type of complaint.
[262] *ibid* at 112
[263] *ibid*
[264] Freeport-McMoran, "Driven By Value: Working Toward Sustainable Development Report" (2016) at 19, available online at < https://www.fcx.com/sites/fcx/files/documents/sustainability/wtsd_2016.pdf> (last accessed, 17 August 2018)
[265] *ibid*
[266] *ibid*

ensure a comprehensive, rights-driven approach while being organized in a way that is relevant to our mining related activities".[267]

The environmental HRDD processes adopted by Glencore, Freeport and others provide a blueprint from existing corporate practice that shows how corporations can proactively use HRDD to understand the harms caused by their activities and to compensate those who suffer environmental rights impacts. In both examples, the companies also acknowledged that their responsibility to investigate and remediate these harms extended to finding ways to try and avoid or mitigate harms that might occur in future.[268]

3.5.4 Widespread integration of human rights norms and standards into corporate practice

This research revealed that the Carbon Majors' public statements demonstrate a deep level of engagement with international human rights norms and standards. This finding supports the theory that the integration of international human rights norms into corporate risk management practices is becoming increasingly widespread, and supports the theory that corporate actors are interpreting the scope of the responsibility to respect fairly broadly. As I will discuss further in Chapter 4, this evidence supports the argument that the Carbon Majors should be connecting their recognition of climate risk and their responsibility to respect human rights.

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[267] *ibid*

[268] "Action plans to address any risks and impacts will be embedded within Cerro Verde's sustainable development risk register process. These plans will support continuous improvement of existing systems and processes, and (where necessary) will establish new measures to investigate, avoid, mitigate and/or remedy identified human rights risks and impacts." *Ibid* at 20

During the course of this research, I found that many of the corporations included in this study not only sought to explicitly align their practice with the UNGPs but also made extensive references to other international norms and standards when explaining the scope of their responsibility to respect human rights. For example, Glencore's one page human rights policy mentions the UNGPs, the Universal Declaration on Human Rights, the International Labour Organization (ILO) Core Conventions on Labour Standards, the Equator Principles, the Voluntary Principles on Security and Human Rights, and the International Council on Mining and Metals' (ICMM) endorsement of the principles of Free Prior and Informed Consent for Indigenous Peoples, which are enshrined in the UN Declaration on the Rights of Indigenous Peoples.[269] Suncor's human rights policy includes a remarkably similar list of international standards, although instead of mentioning the ICMM it mentions the Ten Principles of the UN Global Compact.[270] Comparable statements can also be found in the human rights policies of many of the other corporations reviewed for this study.

I also found that although much of the data regarding corporate commitments to human rights discussed in this Section was drawn from human rights policies, position statements, and reports, or from sections of CSR reports specifically dedicated to human rights, mentions of human rights were also relatively common among the other documents reviewed for this study. Five

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[269] GlencoreXstrata, "Human Rights Policy" available online at < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiFntra_vTcAhWhHDQIHT3nAG4QFjAAegQIAhAC&url=http%3A%2F%2Fwww.glencore.com%2Fdam%2Fjcr%3Ab0bd52eb-f556-4b40-be2a-1dcf53f8dff9%2FHuman-Rights-Policy-English.pdf&usg=AOvVaw2FXDSOEfunerg5pJyR25uS> (*last accessed August 17, 2018*)

[270] Suncor, "Human Rights Policy Statement", available online at < https://sustainability.suncor.com/2017/pdf/Human_Rights_Policy.pdf> (*last accessed August 17, 2018*)

corporations mentioned human rights commitments in their reports to the CDP and 9 corporations mentioned them in their SEC filings, even though no mention of human rights is made in the reporting guidance for either of these schemes.[271]

Another interesting example of human rights norms becoming integrated into broader corporate risk management strategies can be seen in Total's annual report to the SEC. The report includes a detailed summary of its "Vigilance Plan", which sets out "the reasonable measures of vigilance put in place within the Group in order to identify the risks and prevent severe impacts on human rights and fundamental freedoms, human health and safety and the environment" resulting from the corporations' activities or the activities of "companies it controls".[272] This Vigilance Plan is required under a recently passed French law which incorporates human rights due diligence into France's domestic legal regime.[273] As I will discuss further in Chapter 4, the incorporation of the Vigilance Plan across Total's statements about risk management can be seen as evidence of recursivity at work.

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[271] The corporations mentioning human rights in their CDP reports were ConocoPhilips, Total, Occidental, Hess, and Freeport-Mcmoran. BP, Royal Dutch Shell, ConocoPhillips, Total, BHP Billiton, ENI, Freeport-Mcmoran, Suncor and Cemex all mentioned human rights in their annual reports to the SEC.

[272] Total, "Annual Report on Form 20-F" (March, 2018) at 96 available online at: <https://www.sec.gov/Archives/edgar/data/879764/000130817918000062/0001308179-18-000062-index.htm> (*last accessed, 7 September 2018)*

[273] *Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, online: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>, translation by Corporate Justice, online: <http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf> ("Duty of Vigilance Law) (*last accessed September 7, 2018*); For an analysis of the new law see Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", (2017) 2:2 BHRJ 317 – 323

Finally, I found that some corporations made statements in their reports that revealed some of the motivations for direct engagement with international norms and standards. ENI, for example, produced a six-page report on its use of Human Rights Impact Assessments and Human Rights Compliance Assessments, in which it explicitly attributed its decision to start using such assessments to the recent international endorsement of the UNGPs. The report notes that "the debate on the contents and processes for assessing impacts on human rights is still ongoing" and explains that the company has made an active decision to be involved in "road-testing" these processes.[274] This statement confirms that corporations like ENI are fully aware that not only is engagement with human rights issues becoming a necessity, but that by engaging with these norms early on, companies can help to define how they are applied in a given context.

3.5.5 Recognition of climate risk, physical risk and the need for adaptation

The results of this study demonstrate that the overwhelming majority of the Carbon Majors accept that there are foreseeable risks associated with climate change. In total, 88% of the companies included in this study (39 out of 43) recognized some form of climate change related risk. 70% percent (30 out of 43) of the companies included in this study also recognized the potential physical risks posed by climate change. Among the climate change impacts anticipated in the reports I examined were: temperature change; extreme temperatures; increased likelihood of extreme or severe weather; tropical cyclones; sea level rise; droughts and water scarcity; floods; changes to precipitation patterns; melting permafrost; increased risk from snow and ice; fires; and

[274] ENI, "Report on Human Rights Impact Assessments", at 1 available online at < https://www.eni.com/docs/en_IT/enicom/sustainability/integrity-human-rights/due-diligence-assessing-monitoring/1-impact-assessments-salient-human-rights-issues.pdf> (*last accessed August 17, 2018*)

earthquakes.[275] Some companies went even further, identifying not just the physical impacts of climate change but also socio-economic consequences associated with these physical impacts. For example, when describing the "risk events" that could be triggered by climate change, the Spanish corporation Repsol included "wars, armed conflicts and social instability" and "[e]pidemics, plagues or similar outbreaks".[276]

49% percent of the companies analyzed (21 out of 43) also acknowledged the need for climate change adaptation measures to respond to these physical risks. While some of these companies made general references to the concept of climate adaptation, many of the statements regarding the need for climate adaptation measures were made in the context of the companies' own operations. Table 3 provides details of which companies recognized climate risk, physical risk and adaptation.

Table 3: companies recognizing climate risk, physical risk, and adaptation

Climate risk	Physical risk	Adaptation
Chevron	Repsol	Chevron
ExxonMobil	Marathon	BP
BP	Hess	Royal Dutch Shell
Royal Dutch Shell	Glencore	ConocoPhillips
ConocoPhillips	Freeport-Mcmoran	Total
Peabody Energy	Devon Energy	BHP Billiton
Total	Westmoreland Mining	Anglo American
Consol Energy Inc	Suncor	
BHP Billiton	LafargeHolcim	
Anglo American		
RWE		
ENI		

[275] See Appendix B for further details.

[276] Repsol, "Climate Change 2017", report to the Carbon Disclosure Project, at Response to Question CC2.1b

Climate risk	Physical risk	Adaptation
Rio Tinto Arch Coal Anadarko Occidental Lukoil Sasol Repsol Marathon Rosneft Hess Glencore Freeport-Mcmoran EnCana Devon Energy Westmoreland Mining Suncor North American Coal LafargeHolcim Canadian Natural Resources Apache Husky Energy Heidelberg Cement Cemex Murphy Oil Taiheyo OMV Group	Canadian Natural Resources Apache Husky Energy Heidelberg Cement Cemex Taiheyo OMV Group	RWE ENI Rio Tinto Sasol Repsol Glencore Freeport-Mcmoran Suncor LafargeHolcim Apache Heidelberg Cement Cemex Murphy Oil Taiheyo

It must be noted that although the overwhelming majority of companies included in this study accepted the physical risks associated with climate change, a small minority of companies did not. The limited statements regarding climate risk that were made by this group of companies were largely framed in terms of regulatory risks or risks perceived by others. Peabody Energy, for example, discussed growing societal “concern” about GHG emissions, but avoided taking a

position on whether this concern is valid.[277] Even among companies which firmly accepted the risks posed by climate change, statements about addressing those risks were often subject to caveats around the need to continue to supply energy to foster economic growth. This trend is encapsulated in Shell's statement that "Society faces a dual challenge: how to make a transition to a low-carbon energy future to manage the risks of climate change, while also extending the economic and social benefits of energy to everyone on the planet."[278]

3.5.6 Recognition of third-party risk and the need for community adaptation

23% of the companies (10 out of 43) included in this study referred to the physical risks that climate change poses to third parties or referred to the need for adaptation measures to protect third party communities. A list of these companies is provided in Table 4.

Table 4: companies recognizing community risk and the need for community

Company	Country of domicile	Community risk	Community adaptation
ConocoPhilips	USA	Y	Y
BHP Billiton	Australia	Y	Y
Anglo American	UK	Y	Y
Rio Tinto	UK	Y	Y
Occidental	USA	Y	N
Suncor	Canada	N	Y

[277] Peabody Energy, "Form 10-K Annual Report to the SEC" (2018) online at < https://www.sec.gov/Archives/edgar/data/1064728/000106472818000007/btu_20171231-10k.htm> (*last accessed August 17, 2018*)

[278] Shell "Sustainability Report" (2017) at 16, online at < https://reports.shell.com/sustainability-report/2017/> (*last accessed August 30, 2018*)

Company	Country of domicile	Community risk	Community adaptation
LafargeHolcim	Switzerland	Y	Y
Husky Energy	Canada	Y	N
Heidelberg Cement	Germany	Y	Y
Cemex	Mexico	N	Y

Some mentions of climate risks to third parties or the need for communities to adapt were limited to passing observations about "rising temperatures with negative effects on future generations" or references to industry schemes contributing to regional adaptation efforts.[279] But among the group of corporations that recognized the way climate impacts affect communities there were several corporations which also recognized a limited responsibility to support the adaptation efforts of those communities.

In its position statement on climate change, Anglo American notes that it recognizes "the complex global challenge posed by climate change and our responsibility to take action to address its causes and protect our employees, assets, **and host communities**, against its potential impacts."[280] The statement goes on to note that the corporation will "continue to implement appropriate climate adaptation measures at our operations and support our **host government and communities** to adapt to the local consequences of climate change."[281] The section on climate change in Anglo

[279] Quote from Heidelberg Cement, "CDP Report, (2017)", response to CC2.2a;
[280] Anglo American, *"*Anglo American Position Statement: Climate Change*"* (September 2015), available online at: < http://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/environment/climate-change-position-statement-sep-2015.pdf> (*last accessed August 17, 2018*)
[281] *ibid*

American's sustainability report for 2017 provides a number of case studies detailing efforts to anticipate and adapt to climate impacts that may affect its operations in Peru, Chile and Botswana. The stated aim of these efforts is to understand "the potential physical and social effects of climate change on our mining operations **and host communities.**"[282]

In its 2016 *Climate Change Report,* Rio Tinto also recognizes that climate change "poses significant risks for, and in many cases is already affecting, a broad range of human and natural systems".[283] Although the primary focus of the report is on Rio Tinto's efforts to reduce emissions, there are some sections which suggest that Rio Tinto has begun proactively supporting community adaptation efforts. In the section on stakeholder engagement, for example, the report states:

> "[w]e engage with our host communities by listening to, and working with them, on climate change issues that are important to them. This has the potential **to help communities respond to climate change**. It also increases our understanding of local experiences and priorities relating to climate risk and building resilience."[284]

The report goes on to provide an example of this kind of stakeholder engagement, describing Rio Tinto's efforts to work with local stakeholders in Utah to understand the impacts of increased snow melt in the region and to design water sharing strategies to address these. Although Rio Tinto's statements about supporting communities to adapt to climate change are less well developed than

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[282] Anglo American, "Building on Firm Foundations: Delivering a Sustainable Future" (2017) at 65, available online at: < http://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/annual-updates-2018/aa-sustainability-report-2017.pdf> (*last accessed August 17, 2018*)

[283] Rio Tinto, *Climate Change Report* (2016), at 7, online at < http://www.riotinto.com/documents/RT_Climate_change_report.pdf> (*last accessed September 7, 2018*)

[284] *Ibid* at 20

those provided by Anglo American, they nevertheless suggest some of the same acknowledgment of the company's responsibility to at least work with those communities who are geographically proximate to the company's operations on adaptation efforts.

3.5.7 Geographic differences

During the course of this analysis, I observed significant differences between the level of commitment to human rights shown by corporations domiciled in different parts of the world. Almost every company domiciled in a European country displayed some level of commitment to the responsibility to respect human rights.[285] So too did larger multi-national corporations with a global reach domiciled in the US and elsewhere. A small group of 9 North American Companies, however, demonstrated no commitment to human rights and the lowest levels of recognition of climate risk.[286] This group consisted of companies which operate almost exclusively in North America and have a primary focus on North American domestic markets.[287] In spite of the relatively low levels of engagement by some North American companies, however, well over half (19 out of 31) of the corporations which display some level of commitment to human rights are domiciled in common law countries, including the USA, the UK, Australia and Canada.

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[285] The only exception was RAG AG, which I was unable to analyze properly due to a lack of documents in English and which is therefore recorded as having no demonstrated commitment to human rights in this study.

[286] These companies include Consol Energy Inc, Arch Coal, Alpha Natural Resources, Kiewit Mining, North American Coal, Luminant, Murray Coal and Murphy Oil, all domiciled in the US, and EnCana, domiciled in Canada. Two further US companies, Westmoreland Mining and Devon Energy did not recognize any form of human rights responsibility but did recognize physical risks associated with climate change.

[287] The main exception is Murphy Oil, which has operations in South America, Southeast Asia and Australia in addition to its main North American assets, see Murphy Oil, "Global Operations" available online at <http://www.murphyoilcorp.com/What-We-Do/> (*last accessed August 13, 2018*)

3.6 Chapter Conclusion: The Carbon Majors accept both climate risk and the responsibility to respect human rights

The results of this study confirm that the vast majority of the Carbon Majors now accept the existence of climate risk. Many also acknowledge the need to plan for and manage that risk through climate change adaptation. The results of this study also show that the responsibility to respect human rights has a great deal of "normative valence" among the Carbon Majors, i.e. that these companies attach a high degree of importance to the norms contained in the UNGPs. The scope of the responsibility accepted by these companies is fairly wide. Several companies claim that they have already begun to examine the connection between the responsibility to respect human rights and their contributions to environmental harms, and to develop processes to remediate these harms. As the statements from Heidelberg Cement suggest, some may even be beginning to make the connection between human rights and climate change.

These results show that there is little need for debate about whether the Carbon Majors have a broad responsibility to respect human rights. Instead, the debate can begin to focus on questions about the scope of that responsibility and what it means in light of the now widely accepted existence of climate risk. Scholars, companies, and advocates should now be asking how climate risk triggers the responsibility to conduct HRDD, and what HRDD in the climate context could look like. Some of the Carbon Majors' existing practices – such as the application of HRDD to environmental harms or the provision of support for community adaptation efforts – may help us to answer those questions. These existing practices may provide a blueprint for developing the robust HRDD processes needed to discharge the responsibility to respect human rights in the climate context. As I will discuss further in the next Chapter, these conclusions may also prove

persuasive for climate accountability plaintiffs seeking to establish a duty of care on the part of the Carbon Majors.

Chapter 4: Human rights and climate risk: understanding the current practice of the Carbon Majors Part II (analysis)

4.1 Introduction

The results of the study described in Chapter 3 confirm that the majority of the Carbon Majors have publicly acknowledged both their responsibility to respect human rights and the need to manage physical climate risk. However, most of these companies have yet to acknowledge the connection between these two issues. But as I argued in the first two chapters of this thesis, the clearly established connection between human rights and climate change imposes an obligation on them to do so. Recognizing the responsibility to respect human rights creates an expectation that the human rights dimensions of climate risk will be addressed. The fact that many of the Carbon Majors' human rights policies already incorporate human rights harms caused by environmental damage writ large further strengthens the expectation that these practices will be applied to climate change – the most pressing environmental rights issue of our time. In this Chapter, I argue that these conclusions may support climate accountability plaintiffs seeking to establish that the Carbon Majors owe them a duty of care.

In the next section, I analyze how the results described in Chapter 3 might aid climate accountability plaintiffs to meet the tests for the three key elements of the duty of care: foreseeability, proximity, and policy. In section 3, I consider which jurisdictions might be most strategic for climate accountability plaintiffs in light of the differences in approach adopted by companies in different locations. In the final section of this chapter, I consider how potential litigation based on the arguments advanced in this thesis could interact with action by national or

supranational bodies to promote the adoption of HRDD practices in respect to climate related human rights harms. Regardless of whether litigation is initially successful, I argue that it may result in changes to societal expectations about responsibility for climate harms. This may in turn prompt additional action from governmental and intergovernmental bodies to promote the norms under discussion, increasing the likelihood that those norms may be accepted as hard law. By advancing these arguments before the courts climate accountability plaintiffs could not only increase their individual chances of success, but also advance the broader societal conversation about responsibility in the climate context.

4.2 The results of this study could support the existence of a duty of care in the climate context

4.2.1 Widespread recognition of climate risk suggests that climate harms are foreseeable

In this section, I argue that climate accountability plaintiffs could rely on the widespread recognition of climate risk by the Carbon Majors to establish that these companies ought to have foreseen that their activities constituted a significant danger to their fundamental rights. The results of this empirical study demonstrate that not only do the vast majority of the Carbon Majors now accept the reality of the physical risks of dangerous climate change, but that many also accept the need for adaptation measures to limit the impacts of these risks on their own operations and society at large. This confirms the theory that the vast majority of the Carbon Majors would now adopt the same position as that taken by the defendant companies in *Oakland v BP:* instead of arguing about the existence of climate risk, companies will likely focus their arguments on the appropriate

responses to that risk.[288] This high level of consensus around the existence of physical climate risk, and the growing acceptance of the need for climate adaptation measures to limit the harm arising from sea-level rise, extreme weather events, and water scarcity, demonstrate that climate harms are "foreseeable" in the simplest sense of the term. However, as discussed in the introduction to this thesis, in order to meet the test for a duty of care, plaintiffs must not only show that harm was a foreseeable result of the defendant's actions, but also that the plaintiffs were within the "zone of foreseeable risk": i.e. that it could have been predicted that a specific class of persons would suffer a specific type or harm as a result of the defendants' activities.[289]

At this stage of the analysis, the widely accepted responsibility to conduct HRDD may prove useful to climate accountability plaintiffs seeking to establish a duty of care on behalf of the Carbon Majors. Although there is still significant debate about what constitutes best practices for HRDD, it is nonetheless clear that companies should adopt processes for identifying and responding to "all adverse human rights impacts that the business enterprise may cause or contribute to".[290] The UNGPs recognize that in order for such HRDD processes to be practicable they must allow for some degree of prioritization. Where there is scope for a range of human rights impacts to arise as a result of activity "business enterprises should identify general areas where the risk of adverse human rights impacts is most significant…and prioritize these for human rights due diligence."[291] In the context of climate related human rights impacts, this would logically suggest a responsibility

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[288] See discussion in Chapter 3 Section 3.3
[289] It should be noted that there is significant overlap between this aspect of the test for foreseeability and the test for proximity discussed below, and that both factors should be considered when the court is determining whether the defendant "ought" to have been "mindful of the interests" of a given group of potential plaintiffs when contemplating a given action. See Robertson, *supra* at note 16
[290] UNGPs, *supra* at note 17 at Principle 17
[291] UNGPs, *supra* at note 17 at 18

to identify individuals and communities whose human rights are most at risk due to climate change. A company could then begin to take steps to determine how to prevent or mitigate potential impacts and co-operate in the remediation of impacts that have already occurred. Climate accountability plaintiffs – at least those from the communities most vulnerable to climate change – could therefore argue that in order to implement their commitments to respect human rights, the defendants ought to have identified the type of harm that they were likely to suffer as a result of climate change, and that they ought to have taken some action to address those harms.

This argument rests on the premise that once it is established that the Carbon Majors are aware of climate risk, they ought also to be aware of the foreseeable human rights consequences of that risk. It is this awareness that then triggers an obligation to identify and address those consequences through HRDD. This prompts the question: can it be established that the Carbon Majors should be aware of the foreseeable human rights consequences of climate risk?

The case for suggesting that the Carbon Majors should already be cognizant of the connection between human rights and climate change is a strong one. This is not least because these companies have been named as respondents in the PCHR's inquiry, which has now heard extensive evidence regarding the human rights impacts of extreme weather events on vulnerable communities in the Philippines. Indeed, during a recent shareholder meeting BP's Chief Executive Officer Bob Dudley confirmed that he is aware of the connection when he refused to acknowledge its relevance, stating: "Climate change is a global issue…[i]t is not the oil companies', and gas companies' and

coal companies' human rights issue."[292] The results of this study provide further support for the conclusion that the Carbon Majors ought to be aware of the connection between climate change and human rights. The results demonstrate that companies as diverse as Mexican cement company Cemex, South African oil and gas company Sasol, and Italian energy company ENI are all actively engaging with ongoing developments in the international discourse around human rights and the environment, in which climate change has recently emerged as a central topic. This acceptance is reflected in the practice of the 41% of companies who both made a commitment to respecting human rights and acknowledged the connection between human rights and the environment.

Scholars such as Seck and Slattery have expressed concern that "little guidance has been developed to date that brings together business responsibilities with environmental rights".[293] They note that much of the "leadership" on the issue shown to date has in fact come directly from businesses developing their own processes for "aligning their human rights and environmental policies" with new international norms.[294] In support of this statement Seck and Slattery rely on a report issued in 2015 on "Good Practices" for protecting environmental rights issued by the then UN Special Rapporteur on Human Rights and the Environment, John Knox. In that report Knox provided a brief description of the practices for identifying, mitigating and remediating human rights impacts

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[292] Quote attributed to Bob Dudley in Kelly Gilblom, *Sharp Exchanges Highlight BP Fears of Climate Legal Jeopardy* (Bloomberg, 21st May 2018), online at: <https://www.bloomberg.com/news/articles/2018-05-21/bp-sees-legal-jeopardy-in-activists-push-for-climate-action> (*last accessed September 8, 2018*)

[293] Seck and Slattery, *supra* at note 173 at 83

[294] *Ibid.*

connected to the environment described by a handful of companies.[295] The results of this study suggest that since the publication of Knox's report these "good practices" may have become more widespread, and that they are now being adopted by companies in the extractive industries whose activities are closely associated with a range of environmental rights impacts.[296] They also confirm that, even before the dissemination of dedicated external guidance from states or international bodies, corporate actors may develop their own understanding of the key debates of the day and play a significant role in applying the outcomes of those debates in practice.

This engagement with environmental rights issues writ large confirms that companies can and should be expected to be cognizant of the debate around environmental rights and climate change, and to act accordingly. It also suggests that BP's refusal to engage with the issues will not necessarily be adopted across the board. As the evidence of Heidelberg Cement's human rights policy suggests, some of the Carbon Majors are already starting to show "leadership" in acknowledging the connection between the responsibility to respect human rights and the impacts of climate change. As the international discussion around this issue continues to unfold, these companies – and others who have already made some commitment to supporting community climate adaptation efforts – may also begin show leadership in developing HRDD processes to address this connection. Even if companies do not begin to develop these processes

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[295] HRC 28th *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox - Compilation of good practices* UN Doc A/HRC/28/61, February 2015

[296] *Ibid.* Only one of the three examples provided by Knox – the Asian Pulp Paper Group – was from a branch of the extractive industries, the other two being Coca Cola and the outdoor equipment and clothing manufacturer Patagonia.

independently, the results of this study confirm that there is a strong argument for saying that they *ought* to do so. Courts may find this argument persuasive in determining that actual or potential human rights harms suffered by climate accountability plaintiffs ought to have been foreseen by the Carbon Majors.

4.2.2 Recognition of the responsibility to respect human rights and the application of HRDD to environmental risks could contribute to a finding of proximity between the Carbon Majors and individuals suffering from climate related human rights harms

In the previous section, I established that the Carbon Majors' statements about climate risk, coupled with their acceptance of a responsibility to conduct HRDD, could help to demonstrate that climate-related human rights harms meet the foreseeability requirement of the duty of care. In this section, I consider how these statements may be relevant to the next stage of the duty of care analysis: whether there is a relationship of proximity between the Carbon Majors and individuals or communities suffering from human rights harms as a result of their ongoing contributions to global GHG emissions. I argue that the Carbon Majors' statements assuming responsibility for addressing human rights impacts caused by their operations, including environmental rights impacts, are sufficient to establish a relationship of proximity between them and potential climate accountability plaintiffs who have suffered or will suffer serious human rights impacts.

As noted in Chapter 3, recent years have seen a number of common law courts starting to engage with corporate CSR statements and policies when considering whether to extend existing duties of

care owed by large corporations.[297] In the Canadian case of *Hudbay* for example, we saw the court persuaded that the defendant company's human rights policies and use of human rights impact assessments could arguably create an expectation that human rights harms to the plaintiffs would be identified and adequately addressed.[298] In *Lungowe*, the court noted that a parent company's statements assuming some degree of responsibility for the environmental impacts of a subsidiary could create a direct duty of care to those impacted by the subsidiary's operations.[299] This development was framed as a logical extension of the "analogous duty" to employees of subsidiaries based on a parent company's assumption of responsibility for the health and safety measures adopted by its subsidiaries that had been found to exist in *Chandler*.[300] Even without more, the Carbon Majors' statements accepting the responsibility to respect the human rights of third parties who may be affected by their operations could perform a similar function in climate accountability litigation: communities and individuals who suffer serious climate related human rights harms could reasonably be expected to be included in that list. This expectation could be relied on by climate accountability plaintiffs to demonstrate a relationship of "proximity" similar to that discussed in *Lungowe* and *Hudbay*.[301]

As noted in Chapter 2, the question of proximity often rests of whether a defendant can be said to have both a) responsibility to the plaintiffs and b) some degree of control over the source of the

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[297] See Chapter 2 Section 2.3.3
[298] *Hudbay, supra* at note 40
[299] *Lungowe*, *supra* at note 40 at [84]
[300] *ibid* at [83]
[301] *Hudbay*, *supra* at note 42

danger.[302] The statements reviewed for this study suggest that the Carbon Majors, have accepted a responsibility – one that is more than simply voluntary – by accepting the applicability of the UNGPs. This responsibility creates the expectation that these companies will take whatever measures are within their control to lessen the danger to plaintiffs. While the exact degree of "control" the defendants may be said to have in the climate context may be subject to debate, it is clear that they at least have control over their own GHG emissions, which certainly constitute a significant source of the danger.

The contention that the Carbon Majors might be expected to exercise their responsibility under the UNGPs and conduct HRDD in respect of climate related human rights impacts is further supported by two of the conclusions that can be drawn from this study. The first is the widespread application of HRDD to other environmental impacts. The second is the fact that some of the Carbon Majors have begun to assume responsibility for supporting the efforts of communities to adapt to climate change. While this second practice is not yet widespread and is not yet framed in human rights terms, it nevertheless shows that these companies are cognizant of the climate impacts being felt by these communities and the connection between these impacts and to their corporate activities. Recall, for example, BHP's acknowledgement of its responsibility to support global adaptation efforts in light of its status as a "major producer and consumer of fossil fuels".[303] Integrating these existing practices into human rights risk management processes would be a reasonable next step.

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[302] See Chapter 2 Section 2.3.2
[303] BHP Billiton, *supra* at note 225

So far, however, the evidence suggests that in practice the Carbon Majors' recognition of a responsibility to provide remedies to communities impacted by environmental harms – and indeed their recognition of responsibility to support communities' climate adaptation efforts – has been limited to geographically proximate communities. This may reflect the fact that "proximity" in tort law has often in the past been subject to geographic limitations.[304] However, as scholars like Kysar have argued, in a globalized 21st century world it is no longer possible to impose such limitations on responsibility.[305] Instead, law must begin to expand its horizons to address the problem of "instilling responsibility in complex global networks".[306] As the IBA Task Force has noted, this is particularly important in the climate context. They argue that corporations seeking to understand human rights impacts associated with climate change should engage with a wide range of stakeholders to generate a "complete picture of the actual impact on nearby and distant communities", since climate impacts "are not strictly localized to any one area."[307]

The UNGPs reflect a shift in the way we think about the geography of responsibility, making it clear that the responsibility to respect human rights applies globally.[308] After all, if a company like Glencore has a responsibility to remediate the local environmental rights impacts associated with

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[304] See the discussion of proximity, legal geographies, and environmental justice in Peter J. Atkins, M. Manzurul Hassan and Christine E. Dunn "Toxic Torts: Arsenic Poisoning in Bangladesh and the Legal Geographies of Responsibility" (2006) 31:3 Transactions of the Institute of British Geographers 272-285

[305] Kysar, *supra* at note 10; For a further discussion of transnational torts and corporate responsibility for global impacts see Penelope Simons and Audrey Macklin, *The Governance Gap: extractive industries, human rights, and the home state advantage* (Oxford: Routledge, 2014)

[306] Kysar, *supra* at note 10 at 54

[307] IBA report, *supra* at note 132 at 149

[308] The commentary to Principle 23 notes: "Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, **all business enterprises have the same responsibility to respect human rights wherever they operate**." UNGPs, *supra* at note 17 at 25 (emphasis added)

flooding that has been exacerbated by their infrastructure, why should this responsibility not also extend to remediating the environmental rights impacts associated with flooding that has been exacerbated by their contribution to climate change, even though these impacts affect communities which may be more distant? The violation of one group's rights is not less serious than that of the other, simply because the first group is further away. Once it is accepted that HRDD practices should be applied to local environmental rights impacts, a reasonable expectation is created that those practices should also be extended to transboundary environmental rights impacts, including climate change.

Seck and Slattery have connected the global nature of climate change to another potential difficulty in extending the implementation of environmental HRDD to climate harms. They argue that "the inherent difficulty of delineating individual climate changing activities from the collective whole" may impact our ability to assess the human rights impacts that could arise from an individual corporate action.[309] But this concern may set the bar higher than is necessary. Principle 22 of the UNGPs suggests that where businesses "have caused **or contributed** to adverse impacts, they should provide for **or cooperate in** their remediation."[310] The work of Heede and Ekwurzel described in the introduction to this thesis establishes that the Carbon Majors have made a quantifiable contribution to climate change impacts.[311] Therefore, it could also provide a basis for asserting that the Carbon Majors have a corresponding responsibility to cooperate in remediating them.

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[309] Seck and Slattery, *supra* at note 173 at 81

[310] UNGPs, *supra* at note 17 at 24 (emphasis added)

[311] See Heede, *supra* at note 6; Ekwurzel et al., *supra* at note 7

There is another argument that might be leveled against the extension of an obligation to prevent or remediate environmental rights harms to communities beyond those "local" to a company's operations. This argument rests on the large number of potential plaintiffs to whom such an obligation might be owed. But as Stevens has argued, the fact that the number of plaintiffs affected by an action that may be deemed tortious may be "unknowable in advance" cannot be a defence to liability.[312] Using the example of a chemical leak into a well caused by a defendants activities, Stevens points out that the fact that the leak may affect a great number of people cannot mean that the defendants are less culpable. As Stevens notes, the fact that an activity may harm many people "does not provide the defendants with the privilege to poison".[313] As noted in the discussion of foreseeability above, the fact that UNGPs suggest that companies should prioritize which harms to address on the basis of severity may also come to plaintiffs' aid on this point. A reasonable process of prioritization could reduce the scope of any duty established on the basis of the UNGPs to only those plaintiffs who suffer or are likely to suffer the most serious human rights harms as a result of climate change. While this may exclude some plaintiffs from recovery, it would strengthen the case in favor of others.

It may be complex to resolve questions about which communities are at sufficient risk from climate change that they should be considered "proximate", the extent of an individual company's contribution to the harm, and the extent of that company's duty to engage in remediation. However,

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[312] Stevens, *supra* at note 62 at 21

[313] *ibid*

complexity alone is not a valid reason to refuse to engage. The results of this study show that companies like Glencore have already devised human rights grievance mechanisms that can be used by complainants whose human rights have been affected by environmental damage. Were Glencore to work with stakeholders to adapt those mechanisms to respond proactively to complaints brought regarding climate related human rights impacts, then it would have a good argument that the approach adopted should discharge any duty of care to those complainants. While this would still require the company to make a financial contribution to the costs of climate adaptation, it might allow them to avoid the imposition of court-imposed liabilities after costly and reputation-damaging litigation.[314] As ENI noted in its human rights report, the practical ramifications of the norms contained in the UNGPs are still subject to debate.[315] This is as true in the context of climate related human rights impacts as it is in all other contexts. By proactively "road-testing" mechanisms for implementing those norms, corporate actors have an opportunity to help shape what standards of care in the context of climate related rights risks might look like.[316]

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[314] There are of course dangers in suggesting that any entity be allowed free rein to determine the level and extent of its own obligations without reference to independent and impartial judicial or quasi-judicial decision-making. In suggesting that business enterprises could play an active role in the development and implementation of relevant standards I do not necessarily mean to suggest that they should do this on a unilateral basis, or that a corporation's efforts would necessarily be found adequate. However, as Farah and Makhoul have argued, processes such as unilateral arbitration do hold the potential to deliver a right-compatible process for ensuring access to a remedy, particularly if these processes are sufficiently transparent, binding only on the company, and subject to the possibility of subsequent judicial scrutiny. See Youseph Farah and Malakee Makhoul, *Access to an effective remedy in business-related human rights violations in the context of oil and gas disputes* in Rafael Leal-Arcas and Jan Wouters (eds.) *research Handbook on EU Energy Law and Policy* (Edward Elgar: London 2017)

[315] See ENI, *supra* at note 274

[316] *ibid*

4.2.3 Recognition of the responsibility to respect human rights strengthens the argument against letting economic policy concerns prevent the imposition of a duty

Above I have argued that the research findings discussed in this thesis could help climate accountability plaintiffs to establish that they meet the tests for foreseeability and proximity required to establish a duty of care. In this section I discuss how the consensus around the responsibility to respect human rights demonstrated by these research findings could also mitigate against a finding that there are policy reasons to avoid imposing a duty of care in climate accountability cases. Cassel has argued that when it comes to the policy element of the test for a duty of care "much of the 'public policy' analysis has already been done by the Guiding Principles."[317] He argues that the fact that there is an international recognized responsibility to respect should outweigh any policy concerns against imposing a duty to prevent foreseeable human rights harms. As noted in Chapter 3, Cassel's view may be overly optimistic about the degree to which the UNGPs should inform common law norms. It is, however, fair to say that the fact the norms contained in the UNGPs are now widely accepted by the Carbon Majors should act in the plaintiffs' favour when establishing whether policy reasons weigh for or against the imposition of a duty. Once defendants have accepted some responsibility to identify and address human rights impacts to which they contribute, that acceptance increases the likelihood that a court will see it as "fair, just, and reasonable" to expect them to implement that responsibility.

As discussed above, past climate accountability cases have often seen judges accept that the "social utility" of the Carbon Majors' activities are a sufficient policy reason to prevent the imposition of

[317] Cassel, *supra* at note 19 at 200

liability for harms resulting from their contributions to global GHG emissions.[318] These arguments were recently considered in the *Oakland* case discussed in Chapter 3. Although he ultimately decided the case on the basis that the common law nuisance claim had been displaced by federal legislation, Judge William Alsup nevertheless engaged in extensive discussion of questions of economic policy in his judgment in the case.[319] Alsup's comments on the issue reflected the rhetoric adopted in some of the corporate reports reviewed for this study, which discuss the need to balance efforts to reduce fossil fuel emissions with the need to continue to supply energy to support economic growth.[320] He appeared reasonably convinced that the "social utility" of the continued provision of energy from fossil fuels was sufficient to mean that the defendant companies contribution to the threat of sea-level rise could not necessarily be considered an "unreasonable" interference with the public rights of the City of Oakland's inhabitants.[321]

This kind of policy calculus, however, creates a false impression that the Carbon Majors are only faced with black and white choices. It suggests that, once the threat of climate change became known, the Carbon Majors' choice was either to accept that the production of fossil fuels was harmful and cease emissions altogether, thus leaving millions of people without power, or to continue with business as usual, regardless of the consequences. This, of course, is an oversimplification. As discussed above, there are a range of actions the Carbon Majors could be

[318] See discussion in Chapter 2 Section 2.2
[319] Judge Alsup's decision relied on the US Supreme Court's decision in an earlier climate accountability case, *American Electric Power v Connecticut,* to determine that the federal common law claim of nuisance had been displaced by the Clean Air Act. See *Oakland v* BP (Order), *supra* at note **Error! Bookmark not defined.**; See also *American Electric Power,* supra at note 166
[320] See discussion, *supra* at Chapter 3 Section 3.5.4
[321] See *Oakland v BP*, *supra* at note 213 at 8

expected to take to prevent, mitigate, or remediate climate related impacts.[322] These include developing plans to transition away from fossil fuel exploitation to more sustainable forms of power generation as swiftly as possible. However, they also include adopting plans to contribute to those costs of mitigating or remediating the impacts of climate change. Such plans could include the provision of financial and technical support for the implementation of climate adaption measures by communities currently facing serious threats to their human rights as a result of dangerous climate change, or co-operating in the provision of compensation for those who suffer ongoing rights impacts as a result of loss and damage associated with climate change.

The interesting thing about the UNGPs is that they recognize that, when it comes to the balancing of economic activity and responsible conduct, things are not always black and white. They accept that not all human rights impacts can necessarily be avoided entirely.[323] They accept that companies will need to take steps to prioritize actions to address the most serious human rights impacts to which the contribute first. And they accept that there may be multiple approaches to designing HRDD processes to suit specific purposes. By focusing on the wide range of reasonable approaches that the Carbon Majors could have adopted to implement the responsibility to respect human rights in the climate context, climate accountability plaintiffs may be able to convince a court that the companies' failure to adopt any of these approaches was unreasonable. By allowing plaintiffs to focus on the degree to which harms to their fundamental rights could have been

[322] See discussion in Chapter 2 Section 2.4.4
[323] Principle 22 of the UNGPs suggests that the responsibility to remediate rights abuses applied even when human rights impacts were unforeseen or unavoidable. See UNGPS *supra* at note 17

anticipated and mitigated by the Carbon Majors, these arguments allow climate accountability plaintiffs to avoid the black and white policy analysis discussed in the *Oakland* case.

The responsibility to respect human rights may not yet have crystallized into a hard law standard providing an automatic policy reason for imposing a duty of care. But by raising the arguments discussed above in climate accountability plaintiffs could make it more likely that it will do so. As Kysar has argued, climate change is a phenomenon that challenges courts to develop traditional tort law principles in new ways that may be better suited to addressing responsibility within our modern interconnected global systems. In order to avoid new threats to the "core interests [that] tort law claims to protect", Kysar suggests that tort law "will be forced to adapt or perish, much like life itself in a warming world."[324] The UNGPs offer one path by which tort law could adapt. The urgency of the threat of climate change may provide the impetus required for courts to take that path. By offering courts this opportunity, climate accountability plaintiffs may be able to turn the conversation about what appears to be "fair, just and reasonable" from a stark choice between the competing priorities of providing energy and preventing climate harms to one that allows for more nuance.

4.3 Favourable jurisdictions for establishing a duty of care

In the previous section, I argued that the findings discussed in this thesis could support the imposition of a duty of care on the part of the Carbon Majors. In this section I consider how the

[324] Kysar, *supra at* note 10 at 7

divergence in the practice of companies based in different regions demonstrated by my research findings might impact the success of these arguments in those regions.

4.3.1 Establishing a duty of care in the US

The results of this study show that while there is a general trend towards assuming responsibility for human rights impacts, this is far less common among companies focused on US domestic markets. In fact, in contrast to their counterparts domiciled in Europe and elsewhere, many of these companies have made remarkably little effort to present themselves as complying with the emerging global expectations around responsible business conduct with respect to either human rights or climate change. The sheer lack of relevant documents produced by this group of companies is evidence of this low level of engagement.[325] While I was able to analyze six or seven sources of data for each European company, for some of the US domestic companies included in this study I was unable to find any relevant data at all.

There may be several reasons for this divergence in approach. One reason, which relates specifically to the low level of recognition of climate risk, may be the companies' perception of public opinion on climate change. Polling suggest that although a majority of US citizens believe in climate change, the US public remains less intensely concerned about climate change than citizens from other nations.[326] Evidence also suggests that public opinion on climate change is

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[325] See Appendix A for details

[326] Richard Wike, "What the world thinks about climate change in 7 charts" (Pew Research Centre, April 2016), available online: <http://www.pewresearch.org/fact-tank/2016/04/18/what-the-world-thinks-about-climate-change-in-7-charts/> (*last accessed September 8, 2018*)

sharply divided along partisan lines, with Republicans being far less likely to consider climate change a very serious problem than Democrats.[327] The limited engagement with voluntary reporting schemes exhibited by these US companies may be due in part to a sense that among the local populations with which they are most concerned, climate responsibility has not yet evolved into a priority issue.

This first reason may suffice to explain the limited engagement with discussions of climate risk by these companies. But it does not explain their corresponding failure to engage with human rights norms. A possible reason why this group of companies may not be actively engaging with these norms may lie in the fact that both their operations and their markets are primarily domestic. Much of the debate around the need for corporate human rights responsibility has centered on the so-called "governance gap" that allows large multi-national enterprises operating in developing countries to avoid complying with the higher standards of responsibility to which they might be subject in their countries of domicile.[328] Given this background, domestic US companies may feel that they are exempt from the logic of social and reputational risk which requires their multinational competitors to engage with the debate around human rights norms and standards. Indeed, this theory appears to be supported by recent research suggesting that although "CSR investments can be strategically used to inflate financial performance", this strategy generally proves more successful for multinational enterprises than for domestic ones.[329] An unintended

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[327] *ibid*
[328] Macklin and Simmons, *supra* at note 305
[329] Albi Alikaj, Cau Ngoc Nguyen, and Efrain Medina, "Differentiating the impact of CSR strengths and concerns on firm performance: An investigation of MNEs and US domestic firms" (2017) 36:3 Journal of Management Development 401

consequence of the efforts of activists and scholars to increase responsibility among multinational enterprises may be a sense that domestic corporations are justified in refusing to engage in the debate.

Whatever the reason for this divergence in approach between US domestic companies and others, it is possible that it may – in the long run – leave these US companies particularly vulnerable to litigation. As Hunter and Salzman have argued, industry standards constantly evolve as new technologies and societal expectations become relevant. As they do so, higher standards voluntarily accepted by some corporations may become relevant in determining the standards that should be externally imposed on others.[330] Hunter and Salzman provide an example of this phenomenon in their discussion of whether there may be legal duty on corporations reduce GHG emissions to which their activities contribute. They compare the approach of Japanese car makers such as Toyota, which started developing smaller fuel-efficient hybrid vehicles early on, with the approach of major US car manufacturers that have continued to make vehicles with far lower fuel efficiencies. In doing so, Hunter and Salzman argue, Toyota has proved that higher standards have long been technically and economically feasible. In the view of the authors, this proof may leave US companies "more vulnerable to liability" than they might otherwise have been.[331]

This logic suggests that far from insulating themselves from liability, by failing to voluntarily engage with the same standards as their multinational counterparts, these North American

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[330] Hunter and Salzman, *supra* at note 15

[331] *ibid* at 1780

domestic companies may leave themselves open to greater liabilities than their competitors. The evidence from this study may suggest that the rights-based arguments in this thesis may *initially* meet with more success in jurisdictions other than the US, where there is stronger evidence of a consensus around the norms under discussion. This state of affairs is, however, unlikely to last for long. As the call for action around the human rights implications of climate change becomes stronger, whether as a result of litigation in other jurisdictions or as a result of action from national or intergovernmental bodies, these calls are likely to increase the pressure for US based MNCs with more international interests to increase their levels of engagement with these norms. If these MNCs respond to this pressure, then this may create a wider gap between US-domiciled leaders (the MNCs) and US-domiciled laggards (companies with a more domestic focus). In the end, this could then leave the laggards more vulnerable to litigation.

4.3.2 Strategic jurisdictions for plaintiffs: the UK and Canada?

The high levels of acceptance of both the responsibility to respect human rights and the need to manage climate risks among companies domiciled in Europe suggests that the UK might be a more immediately welcoming jurisdiction. An action could be brought in the UK against four of the largest Carbon Majors, BP, Anglo American, and Rio Tinto, and Royal Dutch Shell. The first three are all British companies and were collectively responsible for over 3% of global emissions between 1751 and 2010. Royal Dutch Shell, although headquartered in the Netherlands, is currently incorporated in the United Kingdom.[332] As RDS has been shown to be responsible for

[332] RDS was treated as being domiciled in the UK for the purpose of jurisdiction in the case of *Okpabi*, supra at note 117 at [4]

2.12% of emissions between 1751 and 2010, including the company in an action brought in the UK would allow the case to be brought against companies collectively responsible for more than 5% of all historic emissions worldwide. The fact that all of these companies have made strong commitments to respecting human rights, including environmental rights, may improve the chances of success of such an action in light of the UK Court of Appeal's recent decision in *Lungowe*. The application of EU conflict of law rules preventing a court in any EU member state from refusing to exercise jurisdiction over any case brought before a company domiciled in that state could also be factors in the plaintiffs' favor in any case brought in the UK.[333]

In light of the decision in *Hudbay*, these arguments might also find favour with courts here in Canada. As Fairhurst and Thoms have argued, the *Hudbay* decision and others suggest that Canadian courts may be willing to "judge boldly" and to "rethink" some of the traditional tort doctrines that have previously stood in the way of victims of transnational human rights abuses – the same doctrines that have stood in the way of climate accountability plaintiffs.[334] The four Canadian companies included in this study (collectively responsible for just less than 0.5% of global emissions) showed a range of levels of commitment to human rights, with Suncor demonstrating high levels of commitment and Encana demonstrating none at all. Nevertheless, the Canadian government's clear endorsement of the UNGPs, which was relied on in Amnesty

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[333] *Owusu v Jackson* [2005] EUECJ C-281/02. These rules are likely to remain in force in the UK even after Brexit, see Department for Exiting the European Union, "Providing a cross-border civil judicial cooperation framework: a future partnership paper" (UK Gov, August 2017) available online at: <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper> (*last accessed September 8th, 2018)*

[334] Fairhurst and Thoms, *supra* at 113 at 392

International's submissions in *Hudbay*, could contribute to a finding that the norms contained in the *UNGPs* can and should be applied to the corporate practice of all four companies.[335]

4.4 Further state action around the application of HRDD could strengthen arguments for a duty of care

In keeping with the focus of this thesis, this analysis has so far centered on how the conclusions that may be drawn from this study might support the existence of a common law duty of care. As discussed in Chapter 1, I have chosen to focus on how rights arguments may prove persuasive in tort cases in part because of tort litigation's potential to both reflect and influence societal debates about what constitutes responsible conduct. However, as evidence from this study bears out, while courts and corporate actors are important players in the recursive processes of international legal norm development, governments, legislators, and inter-governmental bodies also continue to play a critical role. As Mccorquodale et al have argued, national (and supra-national) legislation and regulation has been one of the key drivers behind the widespread corporate uptake of HRDD practices to date.[336] In this section I highlight two examples of state action which have already impacted corporate due diligence and reporting practices drawn from my research. I then consider how further legislation, regulation, or guidance might contribute to the debate around how HRDD standards should be applied in the climate context. The development of such guidance could strengthen the impetus for companies to implement HRDD in the climate context, which could in turn reinforce arguments for establishing a duty of care on the part of these companies, increasing

[335] See *Hubday*, *supra* at note 40; See further discussion at Chapter 2 Section 2.2.3
[336] Mccorquodale et al., supra at note 91

the likelihood that climate accountability plaintiffs could meet with success in the courts. Finally, I observe that there is scope for the existing corporate practice documented in this thesis to provide a foundation for further governmental or intergovernmental action on this issue.

The first example of the important role played by states in the process of international norm development can be seen in the fact that even the most recalcitrant US companies engaged with questions around climate risk in mandatory annual reports to the SEC.[337] The SEC guidance on climate risk disclosure was published in 2010 following petitions from investors and civil society groups.[338] The guidance itself cites a growing industry practice of voluntary disclosure about climate risk through schemes like the CDP and GRI as evidence that such disclosure should also be included in companies' annual reports.[339] This example shows the recursive process of norm development discussed in Chapter 3 at work: social pressure leads to the voluntary adoption of legal norms by some corporations; these norms then become so widespread that advocates are able to persuade states to adopt guidance promoting or requiring their use; this guidance in turn leads to the adoption of the norms by companies which had previously declined to engage.

The second example in which a similar process of norm development and dissemination can be seen at work is provided by the French company Total. In its report to the SEC, produced in 2017 following the passage of the French Duty of Vigilance Law, Total provided details of its human

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[337] These companies include North American Coal and Westmoreland Mining, who engaged with the issue of climate risk *only* in their SEC reports.
[338] See DiSalvio and Dorata, *supra* at note 214
[339] SEC Guidance, *supra* at note 246

rights "Vigilance Plan".[340] As companies like Total develop higher standards of human rights due diligence to satisfy the requirements of legislation in one jurisdiction, they begin to apply these practices in other jurisdictions, which may in turn influence the practices of their competitors, raising the expected level of practice across the board.

Since the promulgation of the UNGPs, more than thirty laws and initiatives mandating or promoting HRDD have been introduced by governments around the world.[341] The French Duty of Vigilance Law is, one of the broadest in scope and the first to include explicit provisions allowing any person suffering harms as a result of the business entity's failure to implement a reasonable "vigilance plan" to seek damages for negligence.[342] Similar legislation based on this model is now also being considered elsewhere, including in Switzerland and Germany.[343] The passage of such legislation in civil law countries connecting the responsibility to conduct due diligence to liability in negligence may strengthen the argument that similar liability should also be imposed in common law countries, either by the passage of similar legislation or directly through the courts.

As Halliday and Carruthers have noted, negotiation about the practical implications of new norms often takes place in the court room.[344] A standard of conduct which may initially have "emerged

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[340] See Total, *supra* at note 272

[341] BHRRC, "Examples of government regulations on human rights reporting & due diligence for companies", available online:
< https://www.business-humanrights.org/en/examples-of-government-regulations-on-human-rights-reporting-due-diligence-for-companies > (*last accessed October 5th, 2018*)

[342] See Cossart et al, *supra* at note 273

[343] See John Ruggie, "The New Normal of Human Rights Due Diligence" (Shift, 2018) available online: < https://www.shiftproject.org/news/john-ruggie-weighs-in-on-swiss-debate-on-mandatory-human-rights-due-diligence/> (last accessed August 17, 2018)

[344] Halliday and Carruthers, *supra* at note 23

as a market response to state prescriptions" may, through caselaw, subsequently "be accepted by the state as formal law".[345] From the examples discussed above, it is possible to see how state prescriptions have already influenced the standards of conduct adopted by the Carbon Majors in the context of both climate risk and the responsibility for human rights. Corporate responses to these state prescriptions could in turn influence the outcomes of courtroom negotiations about the legal obligations of these corporations.

Even if litigation around these obligations were initially to prove unsuccessful, it might nonetheless provide the impetus for governments or legislators to devise legislation on the application of HRDD in the climate context. As discussed in the introduction to this thesis, tort litigation can have "regulatory effects", shaping the discourse around expected standards of responsibility in a given area.[346] Doug NeJaime has argued that in the context of social movement lawyering, even litigation loss can unleash the "the political and constitutive potential of law" in ways that may further the aims of the social movement.[347] This may contribute to the creation of a political climate in which legislative or regulatory action becomes possible.[348] By raising the profile of the debate about the human rights responsibility of the Carbon Majors towards those suffering human rights impacts associated with climate change, even unsuccessful litigation could strengthen arguments for national and supranational bodies to develop binding or non-binding guidance on the application of HRDD in this context. Developments in the discussion about these

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[345] *ibid* at 1145

[346] See Schrempf-Stirling and Wettstein, *supra* at note 55

[347] Doug NeJaime, "Winning Through Losing" (2011) 96 Iowa L. Rev 941, at 945

[348] *ibid*

issues of responsibility could also strengthen the arguments in favour of other corporate accountability measures. These measures could include the creation of climate compensation funds, or the introduction of a "fossil fuel levy" on the Carbon Majors to help pay for an international loss and damage mechanism as discussed in Chapter 2.[349]

Of course, governments and intergovernmental bodies could begin to develop such guidance even in the absence of litigation. In fact, there have already been calls for them to do so. One of the recommendations of the IBA task Force, for example, was that the UN Office of the High Commissioner for Human Rights (OHCHR) should develop "a model internal corporate policy" to provide guidance on how to implement HRDD and remediation processes in the context of climate change.[350] If and when the OHCHR takes up this recommendation, the results of this study suggest that examining the existing corporate practice of the Carbon Majors could provide a rich source of evidence for what such a policy could look like. The human rights policies of companies like Heidelberg, and even Glencore and Freeport, all provide models of corporate policies that make an explicit connection between a company's activities and environmental rights impacts. If the OHCHR were to use these examples to develop guidance on how these policies should be extended to the climate context, such guidance would doubtless strengthen the arguments for a duty of care suggested elsewhere in this thesis. This would once again demonstrate how the actions of corporations, states, and intergovernmental bodies can be mutually reinforcing as the implications of international norms are explored.

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[349] Chapter 2 Section 2.4.4

[350] IBA report, *supra* at note 132 at 29

4.5 Chapter conclusion: What does a better understanding of existing corporate practice suggest about the development of the responsibility to respect human rights in the climate context?

Understanding corporate responses to the debate around a set of new international norms can be crucial to understanding what stage that debate has reached. The results of this study suggest that many of the Carbon Majors have started to accept the responsibility to respect human rights and the responsibility to remediate human rights impacts associated with environmental damage. So far, few of the Carbon Majors have begun to implement this responsibility in the context of climate change. However, the Carbon Majors' acknowledgement of climate risk and the responsibility to respect human rights could be expected to trigger action by those companies to understand and remediate climate related human rights harms. This thesis suggests that the debate ought to focus not on the existence of a responsibility to respect human rights *or* the existence of climate risk, but rather how these two issues should be taken to relate to one another and the implications of this relationship for corporate climate liability.

The Carbon Majors' acceptance of the responsibility to address human rights impacts associated with environmental damage creates an expectation that the Carbon Majors should be applying HRDD practices to climate related human rights harms. This expectation could in turn provide a basis for climate accountability plaintiffs to establish a relationship of proximity between themselves and the Carbon Majors. It could also contribute to establishing a duty of care on the part of these companies. Whether immediately successful or not, litigation on this issue could advance the debate around the application of the responsibility to respect human rights in the

climate context, as the PCHR investigation has already begun to do. Successful litigation could confirm the existence of a binding duty of care in the climate context, advancing both the debate around corporate accountability for human rights impacts and corporate accountability for climate harms. Unsuccessful litigation could provide an impetus for governmental or intergovernmental actors to create guidance or regulations on how the obligation to respect human rights should be exercised in the climate context. Whether it comes from the courts or from elsewhere, a continued emphasis on the responsibility to respect human rights in the debate around corporate climate accountability could ensure that the serious human rights impacts associated with climate change remain in the spotlight. A focus on the severity of such harms could help shift the debate away from questions about economic balancing, and back to issues of interpersonal justice.[351]

[351] See discussion, *supra* at Chapter 2 Section 2.2

Chapter 5: Conclusion

To date, judges have taken what Kysar and Weaver have described as a "nihilist approach" to dealing with climate accountability cases.[352] Faced with the complex systemic challenges posed by climate change, tort judges have been unable to rely on "classical" instrumentalist notions of tort law to provide adequate responses.[353] Frequently judges have refused to engage with the issues. However, as the catastrophic harms caused by climate change become manifest, this approach is becoming increasingly "untenable".[354] Judges need to be presented with new creative legal tools to help them re-think their approach to responsibility in the climate context. In this thesis, I have argued that combining rights-based theories of tort, the international norms around business and human rights, and the human rights framing of climate change could provide these tools.

As the PCHR inquiry demonstrates, the connection between the human rights responsibilities of the Carbon Majors and the human rights dimensions of climate change is beginning to receive significant attention from international actors, policy-makers, and scholars alike. While this research has revealed that most Carbon Majors have not publicly made an explicit connection between the responsibility to respect human rights and climate change, the research has also revealed clear and widespread acceptance of each commitment independent of the other. The corporate documents reviewed in this thesis suggest that the vast majority of the Carbon Majors now accept that they have a responsibility to respect human rights, and that a growing number of

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[352] Kysar and Weaver, *supra* at note 55 at 21
[353] *Ibid* at 49
[354] *Ibid* at 21

them are implementing that responsibility through HRDD. The statements reviewed also suggest that the vast majority of the Carbon Majors accept the need to manage the physical risks posed by climate change. As the human rights impacts of climate change are being felt by communities around the world, it becomes increasingly clear that the Carbon Majors must connect these two issues. The example of Heidelberg Cement suggests that some of them are already starting to do so.

Evidence that some of the Carbon Majors have already started to apply HRDD practices to certain types of environmental harm also strengthens the argument that those same practices should be applied to climate change harms. In this thesis, I have described a number of key cases in which judges have started to rely on CSR policies and statements to determine whether a given corporation should be held to owe a duty to a particular class of defendants. Statements by the Carbon Majors accepting responsibility for environmental rights impacts could be expected to include climate impacts, supporting the existence of a duty of care. Despite the fact that their statements could be taken to support this duty, only one of the Carbon Majors – Heidelberg Cement – appears to be considering measures to implement it. However, the fact that the Carbon Majors are not yet implementing the responsibility to prevent or remediate climate related human rights impacts does not mean that they do not have a duty to do so; it simply means that the duty is not yet being adequately discharged.

Successful litigation on this issue would crystallize these responsibilities into hard law, at least in certain jurisdictions. But even unsuccessful litigation may further the debate. Negotiation around legal norms and practices in the courtroom frequently informs parallel discussions taking place in

other international and national forums, and even in boardrooms. By bringing these arguments before the courts, climate accountability plaintiffs may prompt additional action from national and international bodies to promote the adoption of HRDD practices in the climate context, whether through binding legal standards or non-binding guidance. Such action would in turn be likely to affect the outcome of subsequent litigation. One way or another, climate accountability litigation based on the norms of responsibility discussed in this thesis could contribute to those norms becoming "hard law".

In the introduction to a recent volume on the role of human rights in climate governance, Duyck et al noted the urgent need for scholars and lawyers "to develop legal theories and strategies to hold … private actors accountable for their contributions to climate change and the resulting harms."[355] By exploring the role that the responsibility to respect human rights could play in climate accountability cases, this thesis has aimed to contribute to those efforts. It has demonstrated that there is a sound moral and legal basis for establishing a binding duty of care to respect human rights in the climate context. It has also demonstrated that existing corporate practices could be used as a model to develop HRDD processes that could adequately discharge that duty. Further research into the existing application of human rights due diligence and the duty to remediate to other types of environmental human rights harms could support efforts to develop such practices. Synthesizing this research with existing scholarship on corporate emissions

[355] Sébastien Duyck, Sébastien Jodoin & Alyssa Johl, "Integrating human rights in global climate governance: an introduction" Sébastien Duyck, Sébastien Jodoin & Alyssa Johl (eds.), *The Routledge Handbook of Human Rights and Climate Governance* (London: Routledge, 2018) at 9

reduction obligations and climate compensation schemes could also help corporations, states, and international bodies to design policies and guidance on this issue.

The momentum around the corporate responsibility to respect human rights is gathering. So is the momentum around the human rights dimensions of climate change. As the PCHR inquiry and the proposed action against Shell by Friends of the Earth Netherlands suggest, it is only a matter of time before these two issues are connected in the courtroom. Faced with these developments, the Carbon Majors will have to make a choice. They can seek to deny the connection, as BP's Bob Dudley has sought to do, or they can engage with this issue head on, as Heidelberg Cement's human rights policy has begun to. Choosing a policy of denial may be risky. As Ruggie has argued, the new global "social norms and expectations" around responsible business conduct have begun to generate an acceptance that directly engaging with social risks is in the company's own best interest.[356] In an interconnected global society, it is increasingly difficult for corporations to bury their heads in the sand.

[356] John Gerard Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principle and the Proposed Treaty on Business and Human Rights* (January 23, 2015). Available online at SSRN: https://ssrn.com/abstract=2554726 (*last accessed September 8, 2018*)

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Appendices

Appendix A: Details of documents reviewed for each of the Carbon Majors

Key:
Y = Document or statement reviewed
N = No document available
N = No document reviewed, documents may exist but could not be accessed or were unavailable in English*
Y = Document available but is a duplicate of another document*

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
Chevron (USA)	Y	Y	N	Y	Y	Y	Y	6
ExxonMobil (USA)	Y	Y	N	Y	Y	Y	Y	6
BP (UK)	Y	Y	Y	Y	Y	Y	Y	7

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
Royal Dutch Shell (Netherlands)	Y	N	Y	Y	Y	Y	Y	6
ConocoPhillips (USA)	Y	Y	N	Y	Y	Y	Y	6
Peabody Energy (USA)	N	N	Y	Y	Y*	N*	Y	4
Total (France)	Y	Y	Y	Y	Y	Y	Y	7
Consol Energy Inc (USA)	N	N	N	N	N	N	Y	1

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
BHP Billiton (Australia)	Y	Y	N	Y	Y	Y	Y	6
Anglo American (UK)	N	Y	Y	Y	Y	Y	N	5
RWE (Germany)	Y	N	N	Y	Y	Y	N	4
ENI (Italy)	Y	Y	Y	Y	Y	Y	Y	7
Rio Tinto (UK)	Y	Y	N*	Y	Y	Y	Y	6
Arch Coal (USA)	N	N	N	Y	N	N	Y	1

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
Anadarko (USA)	Y	N	N	Y	Y	Y	Y	5
Occidental (USA)	Y	N	N*	N	Y	Y	Y	4
Lukoil (Russia)	Y	Y	Y	Y	Y*	Y	N	6
Sasol (South Africa)	Y	N	Y	Y	N	Y	N	4
Repsol (Spain)	Y	Y	Y	Y	Y	Y	N	6
Marathon (USA)	Y	N	Y	Y	Y*	N	Y	5

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
Rosneft (Russia)	N	N	Y	N	Y	N*	N	2
Hess (USA)	Y	Y	N	Y	Y	Y	Y	6
Glencore (Switzerland)	Y	Y	Y	Y	Y	Y	N	6
Alpha Natural Resources (USA)	N	N	N*	N	N	N	N	0
Freeport-Mcmoran (USA)	Y	Y	Y	Y	Y*	Y	Y	7

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
EnCana (Canada)	Y	N	Y	Y	Y*	Y	Y	6
Devon Energy (USA)	N	N	Y	Y	Y	Y	Y	5
Westmoreland Mining (USA)	N	N	N	N	N	Y	Y	2
Suncor (Canada)	Y	Y	N*	Y	Y	Y	Y	6
Kiewit Mining (USA)	N	N	N	N	N	N	N	0

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
North American Coal (USA)	N	N	N	N	N	N	Y	1
RAG AG (Germany)	N*	N*	N*	N*	N*	N*	N	0
Luminant (USA)	N	N	N	Y	Y	N	N	2
LafargeHolcim (Switzerland)	Y	Y	N	Y	Y	Y	N	5
Canadian Natural	Y	N	Y	Y	Y*	Y	Y	6

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
Resources (Canada)								
Apache (USA)	N	Y	Y	N	Y	N	Y	4
Murray Coal (USA)	N	N	N	N	N	N	N	0
Husky Energy (Canada)	Y	N	Y	Y	Y	Y	Y	6
Heidelberg Cement (Germany)	Y	Y	N*	Y	Y	Y	N	5

Company	Human Rights statement on website	Human Rights policy or position statement	Report from GRI database	Climate Change statement on website	Climate Change or Sustainability report	CDP report	SEC filing	Total Number of Sources
Cemex (Mexico)	N	Y	Y	Y	Y	Y	Y	6
Murphy Oil (USA)	N	N	N	Y	Y	N	Y	3
Taiheyo (Japan)	Y	Y	N	Y	Y	N*	N	4
OMV Group (Austria)	Y	Y	N*	Y	Y	Y	N	5
							Total number of sources	**189**

Appendix B: Details of physical risks associated with climate change anticipated by the Carbon Majors

Company	Risks identified
Chevron (USA)	Storm surges; sea level rise; cyclones; fires; earthquakes
ExxonMobil (USA)	Extreme weather; storm surges; sea level rise; changes in ice and permafrost; earthquakes
BP (UK)	Extreme weather; sea level rise; higher temperatures; precipitation changes; cyclones
Royal Dutch Shell (Netherlands)	Temperature change; sea level rise; precipitation change; cyclones; extreme weather
ConocoPhillips (USA)	Storm surges; extreme weather; temperature change; precipitation change
Peabody Energy (USA)	-
Total (France)	Water scarcity; sea level rise; extreme weather; cyclones; precipitation changes
Consol Energy Inc (USA)	-

Company	Risks identified
BHP Billiton (Australia)	Sea level rise; precipitation changes; temperature changes; cyclones; extreme weather; floods and droughts; storm surges
Anglo American (UK)	Extreme weather; water scarcity; water security; floods; temperature change; precipitation change
RWE (Germany)	Temperature change; seal level rise; extreme weather; precipitation changes
ENI (Italy)	Extreme weather; cyclones; sea-level rise; droughts; floods
Rio Tinto (UK)	Ocean acidification; extreme weather; temperature change; precipitation change; cyclones; drought; water scarcity; sea-level rise; earthquakes; floods; fires
Arch Coal (USA)	-
Anadarko (USA)	Extreme weather; cyclones
Occidental (USA)	Extreme weather; floods; tropical cyclones; precipitation changes
Lukoil (Russia)	-

Company	Risks identified
Sasol (South Africa)	Temperature change; precipitation change; floods; water scarcity; cyclones; extreme weather
Repsol (Spain)	Drought; floods; temperature change; water scarcity; extreme weather; precipitation change; seal level rise; wars; armed conflicts and social instability; epidemics, plagues or similar outbreaks
Marathon (USA)	Changes in weather patterns and climate
Rosneft (Russia)	-
Hess (USA)	Tropical cyclones; extreme weather
Glencore (Switzerland)	Water scarcity; melting permafrost; flooding; precipitations changes; drought; sea-level rise; cyclones
Alpha Natural Resources (USA)	-
Freeport-Mcmoran (USA)	Scarcity of water; extreme weather

Company	Risks identified
EnCana (Canada)	-
Devon Energy (USA)	Temperature change; precipitation change
Westmoreland Mining (USA)	Extreme weather; natural disasters
Suncor (Canada)	Temperature extremes; hurricanes and icebergs; droughts; precipitation change; snow and ice; cyclones; floods
Kiewit Mining (USA)	-
North American Coal (USA)	-
RAG AG (Germany)	-
Luminant (USA)	-
LafargeHolcim (Switzerland)	Temperature change; severe weather; snow and ice; tropical cyclones; precipitation change; scarcity of water; sea level rise

Company	Risks identified
Canadian Natural Resources (Canada)	Temperature change; sea-level rise; extreme weather
Apache (USA)	Severe weather; cyclones
Murray Coal (USA)	-
Husky Energy (Canada)	Floods; drought; snow and ice; severe weather; precipitation change; temperature change
Heidelberg Cement (Germany)	Water scarcity; temperature change; cyclones; extreme weather
Cemex (Mexico)	Extreme weather; cyclones; sea-level rise
Murphy Oil (USA)	Temperature change
Taiheyo (Japan)	-
OMV Group (Austria)	Water scarcity; drought; precipitation changes