

SCHOLARLY ARTICLE

Beyond Climate Due Diligence: Fossil Fuels, ‘Red Lines’ and Reparations

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Abstract

The scale and scope of the climate crisis and its drastically worsening impacts means that even as a ‘climate due diligence’ obligation is increasingly taking shape as a dimension of human rights due diligence, there is also growing evidence of the limitations of this emerging norm. This article provides four critiques of climate due diligence based on its insufficiency, its conceptual ambiguity, its operational limitations, and its structural limitations. It argues that these critiques could be addressed by regulatory reform that draw clear ‘red lines’ based on the need to prevent the development of any new fossil fuel and address the ‘corporate capture’ of regulatory institutions by the fossil fuel industry. Additionally, it calls for reparations to ensure effective access to a remedy for existing and potential future climate-related human rights impacts that business has caused or contributed to.

Keywords: climate change; fossil fuels; net zero; red lines; reparations

1. Introduction

The scale and scope of the climate crisis and its drastically worsening impacts means that even as ‘climate due diligence’ is increasingly taking shape as a dimension of human rights due diligence (HRDD), there is also growing evidence of the limitations of this emerging norm to confront the root causes of the climate crisis or to provide accountability and redress for the corporate actions that have contributed to the climate crisis. The growing consensus about the need for HRDD to adopt an integrated approach that addresses both environmental and human rights impacts is a welcome development within the field of business and human rights. However, building on various critiques of HRDD, this article warns that gradually expanding the concept of HRDD and consolidating the practice of climate due diligence is an inadequate response to the climate crisis and the irresponsible corporate business practices, especially of the fossil fuel industry, that have contributed to the crisis.

This article advances four different critiques of the emerging concept of climate due diligence: (i) the *insufficiency* of climate due diligence to fully ensure corporate respect to human rights in the context of climate change; (ii) the *conceptual ambiguity* regarding what standard of conduct climate due diligence imposes; (iii) *operational limitations* in conducting climate due diligence due to the spatially and temporally dispersal nature of climate-related human rights impacts; and (iv) *structural limitations* of climate due diligence given the

political and economic powers of the corporate actors overwhelmingly responsible for climate-related human rights impacts, namely the fossil fuel industry. These critiques might seem to require different responses: more reformist responses that propose additional measures or clarificatory standards to address first two, while the latter two critiques suggest the need for broader, more structural reform of existing corporate accountability regulatory approaches.

This article argues, however, that all these critiques could be addressed by regulatory reforms that draw clear ‘red lines’ to constrain or prevent business activities that are incompatible with a rights-based, just transition to a low-carbon society.¹ This article proposes two such ‘red lines’: the need to prevent the development of any new fossil fuel projects or expansions to existing projects, and address the excessive political and economic power of the fossil fuel industry and prevent the ‘corporate capture’ of regulatory bodies by the fossil fuel industry. This article also calls for further measures to ensure effective access to a remedy for existing and potential future climate-related human rights impacts that business have caused or contributed to. It suggests two such measures, namely, redress for the misleading and deceptive conduct of the fossil fuel industry and compensation to redress the adverse impacts of climate change that corporate actors have caused or contributed to.

Overall, this article calls on business and human rights advocates, practitioners and scholars to think beyond the gradual expansion of HRDD to also encompass climate impacts, but rather to think more broadly about the types of corporate accountability measures that are necessary to address the root causes of the climate crisis, namely, fossil fuel dependency, and to systemically challenge the irresponsible business model pursued by the fossil fuel industry. This article advances its argument by first providing an overview of the emerging concept of human rights due diligence, drawing on Chiara Macchi’s important analysis of the ‘consolidating consensus’ around the responsibility it imposes.² Section III then develops the fourfold critiques of climate due diligence that builds on Surya Deva’s critique of mandatory human rights due diligence: it is inadequate, conceptually ambiguous, operationally limited and structurally limited.³ Section IV explores how the drawing of clear ‘red lines’ could productively respond to each of these critiques. Section V considers further measures necessary to ensure remedy for existing and potential future climate-related human rights impacts that businesses have caused or contributed to.

II. The Emerging Norm of Climate Due Diligence

Climate Change and Human Rights

Atmospheric levels of greenhouse gases (GHG) are at the highest level in 3.6 million years and continuing to grow at record rates.⁴ The world is close to ‘irreversible’ climate breakdown.⁵ The Intergovernmental Panel on Climate Change (IPCC) has warned that

¹ Surya Deva, ‘Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?’ (2023) 36 *Leiden Journal of International Law* 389.

² Chiara Macchi, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of “Climate Due Diligence”’ (2021) 6 *Business and Human Rights Journal* 93.

³ Deva, note 1.

⁴ UN News, ‘Climate Change: CO₂ and Methane in our Atmosphere Reach Record Levels’ (26 October 2022), <https://news.un.org/en/story/2022/10/1129887> (accessed 28 April 2023); Paul Brown, ‘Rise of Atmospheric Carbon Dioxide Continues Unabated’, *The Guardian* (17 April 2021), <https://www.theguardian.com/news/2021/apr/17/rise-atmospheric-carbon-dioxide-covid-climate> (accessed 28 April 2023).

⁵ Damian Carrington, ‘World Close to “Irreversible” Climate Breakdown, Warn Major Studies’, *The Guardian* (27 October 2022), <https://www.theguardian.com/environment/2022/oct/27/world-close-to-irreversible-climate-breakdown-warn-major-studies> (accessed 28 April 2023).

only a 'brief and rapidly closing window of opportunity' remains to 'secure a liveable and sustainable future for all'.⁶ Given there have been decades of delay, the United Nations Environment Programme (UNEP) recently stated that 'only an urgent system-wide transformation can avoid climate disaster'.⁷ Already at 1.1°C of warming, climate change is severely threatening the realization of human rights around the world with these who are already socially vulnerable and marginalized impacted most severely.⁸ Already five million deaths a year are linked to climate change, and climate disasters are costing over USD100 billion annually, and these figures are projected to increase as climate change intensifies.⁹ Thus, drastic increases in mitigation ambition, as well as international cooperation and financial support for adaptation and addressing loss and damage is urgently needed to save millions of lives from 'climate carnage'.¹⁰

The close connection between climate change and human rights and the fact that climate change will have a 'cataclysmic' impact on the realization of almost all human rights is well established.¹¹ In 2018, the Human Rights Committee's General Comment on the Right to Life identified that '[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.¹² In 2019, five UN treaty bodies issued a joint statement on climate change and human rights where they stated that '[f]ailure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations'.¹³ The landmark ruling of the Human Rights Committee in *Billy et al v Australia* confirmed climate impacts are already causing human rights violations.¹⁴

⁶ Hans-Otto Pörtner et al, 'Summary for Policymakers', in Hans-Otto Pörtner et al (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022), 33.

⁷ United Nations Environment Programme, *Emissions Gap Report 2022* (Nairobi: United Nations Environment Programme, 2022).

⁸ Pörtner et al, note 6.

⁹ Laura Millan, 'Climate Change Linked to 5 Million Deaths a Year, New Study Shows', *Bloomberg* (7 July 2021), <https://www.bloomberg.com/news/articles/2021-07-07/climate-change-linked-to-5-million-deaths-a-year-new-study-shows#xj4y7vzkg> (accessed 28 April 2023); Angely Mercado, 'Climate Change Disasters Cost the World Over \$100 Billion this Year', *Popular Science* (4 January 2022), <https://www.popsci.com/environment/climate-disaster-cost-2021> (accessed 28 April 2023).

¹⁰ Damian Carrington, "'Climate Carnage': UN Demands Funding Surge to Save Lives", *The Guardian* (3 November 2022), <https://www.theguardian.com/environment/2022/nov/03/future-generations-face-climate-carnage-without-surge-in-funding-un> (accessed 28 April 2023); United Nations Environment Programme, *Too Little, Too Slow: Climate Adaptation Failure Puts World at Risk – Adaptation Gap Report 2022* (Nairobi: United Nations Environment Programme, 2022).

¹¹ UN General Assembly, 'Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', A/74/161 (15 July 2019), para 26; Sumundu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (New York: Routledge, 2006), 6.

¹² Human Rights Committee, 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', CCPR/C/GC/36 (3 September 2019), para 62.

¹³ Joint Statement by the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 'Statement on Human Rights and Climate Change', HRI/2019/1 (14 May 2020), para [1] under the heading 'States' Human Rights Obligations'.

¹⁴ Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019', CCPR/C/135/D/3624/2019 (22 September 2022). The Committee found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture (Article 27) and right to be free from arbitrary interferences with their private life, family and home (Article 17).

Given these violations, the Committee held that Australia has obligations to provide applicants with an ‘effective remedy’ and was required to make full reparation to individuals whose rights have been violated.

Business, Climate Change and Human Rights

Corporations are a major contributor to the climate crisis, both as a producer of GHG emissions and how they are directly linked to GHG emissions of other entities through their operations, products or services.¹⁵ Ground-breaking analysis by Richard Heede has quantified the contribution of different corporate actors to the climate crisis and showed that just 90 producers of fossil fuels and cement – the so-called ‘carbon majors’ – have created 63 per cent of cumulative worldwide emissions from 1751 to 2010.¹⁶ Further analysis has shown that between 1965 and 2018, 35 per cent of all fossil fuel and cement emissions have been produced by just 20 investor-owned and state-owned oil, natural gas and coal producers.¹⁷ Due to advances in the science of extreme weather event attribution, it is possible to identify the corporate contribution to increases in global atmospheric CO₂, surface temperature, sea level rise and ocean acidification.¹⁸ This evidence base has informed ongoing discussions about moral responsibility of corporate actors for climate change impacts,¹⁹ especially the ‘distinctive responsibilities of the major investor-owned producers of fossil fuels’ who ‘carry significant responsibility for climate change’.²⁰

The 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) set out state’s obligation to protect human rights (Pillar I), the corporate responsibility to respect human rights (Pillar II) and access to remedy (Pillar III). The corporate responsibility to respect human rights is ‘rooted in a transnational social norms, not an international legal norm’.²¹ Its scope, therefore, is defined by ‘social expectations’²² or a so-called ‘social licence to operate’ which ‘can be as important to business’ success as legal norms’.²³ It is essentially an responsibility to ‘do no harm’²⁴ which arguably has a ‘broader application’ than legal obligations, but also a ‘shallower application, as it is clearly not binding, and even “not-

¹⁵ Christopher Wright and Daniel Nyburg, *Climate Change, Capitalism and Corporations: Processes of Creative Self-Destruction* (Cambridge: Cambridge University Press, 2015).

¹⁶ Richard Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers: 1854–2010’ (2014) 122 *Climatic Change* 229.

¹⁷ Carbon Accountability Institute, ‘Carbon Majors: Update of Top Twenty Companies 1965–2017’ (9 October 2019), <https://climateaccountability.org/wp-content/uploads/2020/12/CAI-PressRelease-Top20-Oct19.pdf> (accessed 28 April 2023).

¹⁸ Sophie Marjanac and Lindene Patton, ‘Extreme Weather Event Attribution Science and Climate Litigation: An Essential Step in the Causal Chain’ (2018) 36:3 *Journal of Energy and Natural Resources Law* 265; Brenda Ekwurzel et al, ‘The Rise in Global CO₂, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers’ (2017) 144 *Climatic Change* 579.

¹⁹ Henry Shue ‘Responsible for What? Carbon Producer CO₂ Contributions and the Energy Transition’ (2017) 144:4 *Climatic Change* 591.

²⁰ Peter C Frumhoff, Richard Heede and Naomi Oreskes ‘The Climate Responsibilities of Industrial Carbon Producers’ (2015) 132 *Climatic Change* 157.

²¹ John Gerard Ruggie and John F Shermann III, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28:3 *European Journal of Human Rights* 921, 923.

²² Human Rights Council, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’, A/HRC/8/5 (7 April 2008), para 54.

²³ Human Rights Council, ‘Business and Human Rights: Towards Operationalising the “Protect, Respect and Remedy” Framework – Report to the UN Human Rights Council’, A/HRC/11/13 (22 April 2009), para 46.

²⁴ Human Rights Council, ‘Protect, Respect and Remedy’, note 22, para 24.

law”²⁵ The corporate responsibility to respect human rights requires business to both avoid causing or contributing to adverse human rights impacts through their own activities as well as to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services through business relationships.²⁶

The corporate responsibility outlined in the UNGPs are clearly applicable to climate-related human rights impacts. This is the case although climate impacts were not included in the minimum standards articulated in Principle 12,²⁷ as this list was never intended to be a ‘finite list of rights for companies to respect’.²⁸ Moreover, as Chiara Macchi and Nadia Bernaz have argued, the principle of ‘systemic integration’ should be applied, to require the interpretation of Pillar II of the UNGPs in light of relevant rules of international law, including environmental and climate law.²⁹ Thus, the corporate responsibility to respect human rights requires business to avoid causing or contributing to climate-related human rights impacts and to seek to prevent those climate-related human rights impacts they are linked to through their business relationships.

The Concept of Climate Due Diligence

A key strategy proposed by the UNGPs to ensure businesses satisfy their responsibility to respect human rights is undertaking HRDD to identify, prevent, mitigate and account for how they addresses their adverse impacts on human rights.³⁰ Indeed, many commentators have described HRDD as being at the ‘heart’ of the UNGPs, although their author has disputed this characterization.³¹ There have been ongoing debates about whether ‘due diligence’ is a ‘standard of conduct to discharge a responsibility’ or a ‘process to manage human right risks’³² and the extent to which HRDD contemplates a responsibility to achieve a result.³³ In developing the UNGPs, Ruggie used the term ‘due diligence’ to describe ‘a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks’.³⁴

HRDD entails four different steps: identifying and addressing any actual or adverse human rights impacts; taking appropriate action by integrating the findings from impact

²⁵ Sarah Joseph and Joanna Kyriakakis, ‘From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power’ (2023) 36 *Leiden Journal of International Law* 335.

²⁶ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011) (UNGPs), Principle 13.

²⁷ *Ibid*, Principle 12.

²⁸ Human Rights Council, ‘Business and Human Rights’, note 23, para 52.

²⁹ Chiara Macchi and Nadia Bernaz, ‘Business, Human Rights and Climate Due Diligence: Understanding the Responsibilities of Banks’ (2021) 13 *Sustainability* 8391.

³⁰ UNGPs, note 26, Principle 15.

³¹ See Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28:3 *European Journal of International Law* 899, 900; John Gerard Ruggie and John F Shermann, III, note 21, 923.

³² Bonnitcha and McCorquodale, note 31; Ruggie and Shermann, note 21; Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerald Ruggie and John F Sherman, III’ (2017) 28:3 *European Journal of International Law* 929.

³³ See, for example, Deva, arguing that ‘HRDD does not contemplate any responsibility to achieve a “result”, even in situations where adverse human rights impacts are caused or contributed to by a business enterprise’: Deva, note 1, 398.

³⁴ Human Rights Council, ‘Business and Human Rights’, note 23, para 71. See also the UN Working Group on Business and Human Rights, ‘The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, A/73/163 (16 July 2018), para 10; and OECD, ‘OECD Due-Diligence Guidance for Responsible Business Conduct’ (2018), para 16.

assessments; tracking the effectiveness of their response; and communicating externally how adverse impacts are being addressed. The process should address both that a company ‘cause[s] or contribute[s] to through its own activities’ as well as impacts ‘directly linked’ to the company through ‘business relationships’.³⁵ However, the appropriate action required of business differs depending on whether the human rights impact is one the business ‘caused’, ‘contributed to’ or is ‘linked to’ through business relationships.³⁶ Finally, where a business is ‘linked to’ a human right impact, it should consider a number of factors including its degree of leverage over the relevant entity, the importance of the business relationship, the severity of the human rights impacts, and potential human rights consequences of ending the business relationship.³⁷ Building on this, Macchi argues climate due diligence entails requirements to do a risk assessment, to set concrete climate targets, to monitor results of steps taken and to communicate these steps to the public.³⁸

In response to the growing awareness of climate-related human rights impacts that have been contributed to by business actors, scholars sought to provide clarity by identifying the scope and main features of the consolidating concept of climate due diligence.³⁹ Chiara Macchi analysed judicial regulatory developments and argued that ‘climate change-related human rights impacts are ... a necessary dimension of the HRDD that businesses are required to put in place in order to fulfil their responsibility to protect’.⁴⁰ She identified that this emerging concept of climate due diligence includes two features: risk mitigation and integration (the obligation to reduce the GHG emissions in corporations’ activities) and integrating climate-related objectives into policies and processes. Chiara Macchi and Nadia Bernaz have further elaborated how the emerging concept of climate change due diligence applies to banks, who primarily contribute to climate change indirectly.⁴¹

However, there are several challenges in articulating and applying coherent climate due diligence standards. These echo many of the challenges encountered in climate litigation, including challenges in attributing responsibility to individual actors for impacts that are the result of cumulative actions by multiple actors, and challenges in drawing lines of causation between actions and their eventual effects.⁴² Climate change thus presents many challenges for traditional legal ways of thinking about impact and causation, and also for how we understand whether a company has ‘caused’, ‘contributed to’ or is ‘linked to’ a climate-related human rights impact. Demonstrating climate change-related human rights impacts requires showing a ‘double causality’: that is, businesses are contributing to climate change through their actions, and climate change is causing human rights impacts.⁴³ Attributing an ‘actual’ or ‘potential’ climate change-related human rights impact to the actions of a corporation therefore requires showing that climate change is the cause of the specific human rights impacts, and that the company has contributed to causing climate change.⁴⁴

³⁵ UNGPs, note 26, Principle 17.

³⁶ See Tara Van Ho and Mohammed K Alshaleel, ‘The Mutual Fund Industry and the Protection of Human Rights’ (2018) 18 *Human Rights Law Review* 1.

³⁷ *Ibid.*

³⁸ Macchi, note 2, 113–114.

³⁹ Macchi, note 2; Macchi and Bernaz, note 29.

⁴⁰ Macchi, note 2, 108.

⁴¹ Macchi and Bernaz, note 29.

⁴² Jacqueline Peel, ‘Issues in Climate Change Litigation’ (2011) 5:1 *Climate and Carbon Law Review* 15.

⁴³ Macchi, note 2, 111. See also David Birchell, ‘Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts’ (2019) 25:3 *Australian Journal of Human Rights* 428.

⁴⁴ Macchi, note 2, 111.

An ‘adverse human right impact’ occurs, the OHCHR guidance clarifies, when ‘an action removes or reduces the ability of an individual to enjoy his or her human rights’.⁴⁵ Although ‘impacts’ are something incorrectly interpreted as ‘abuses’, as David Birchall has shown, the notion of ‘impact’ ‘expands well beyond the scope of legal infractions to capture a much wider range of harms’ including ‘harmful outcomes of non-violative, or legally-permitted, acts’.⁴⁶ This has important purchase in the context of climate change, given that climate-related human rights impacts are the aggregate result of cumulative GHG emissions, many of which are caused by legally sanctioned activities. However, climate change also challenges traditional legal understandings of impacts. The IPCC uses the language of ‘risk’ as a ‘framework for understanding the increasingly severe, interconnected and often irreversible impacts of climate change on ecosystems, biodiversity, and human systems’.⁴⁷ Risks are the product of dynamic interactions between climate-related *hazards* and the *exposure* and *vulnerability* of affected human or ecological systems. While the increasingly sophistication of attribution science makes it possible to demonstrate the links climate change and specific changes or events (such as sea-level rise or a flooding event),⁴⁸ the way in which the impacts of such climate hazards are experienced by rights-holders is also mediated by existing social systems. Moreover, given that climate science talks in terms of risks and probabilities of certain adverse events, it cannot be predicted with certainty precisely *what* adverse climate-related human rights impacts will occur *when*, although science can demonstrate the increased likelihood, frequency and severity of such adverse events, even though (as discussed above) it can quantify the corporate contribution to increases in global atmospheric CO₂, surface temperature, sea-level rise and ocean acidification.⁴⁹

Developments in attribution science now also make possible to show how certain anthropocentric drivers, such as the GHG emissions produced through corporate activity, are affecting the climate system. However, given anthropocentric climate change is the product of cumulative emissions from multiple sources over a longer period of time, no single entity can be said to have ‘caused’ climate change. Rather, the question becomes one of to what degree a specific corporation has ‘contributed’ to causing climate change through its own GHG emissions or the extent to which its operations, products and services are directly or indirectly ‘linked to’ the GHG emissions of other entities through its business relationships.

Contribution can be shown by acts or omissions that ‘materially increase the risk of the specific impact which occurred even if they would not be sufficient, in and of themselves, to result in the impact’.⁵⁰ In the context of climate change, this calls for an assessment of when the GHG emissions that can be attributed to, or linked to, a business have materially increased the risk of anthropocentric climate change. However, precisely quantifying such a *level* of GHG emissions is difficult, and Macchi and Bernaz suggest that ‘it is not possible to fix a level of emissions that determines with certainty the existence of contribution responsibility’.⁵¹

⁴⁵ Office of the High Commissioner for Human Rights, ‘The Corporate Responsibility to Respect Human Rights – An Interpretative Guide’ (2012) HR/PUB/12/025.

⁴⁶ David Birchall, ‘Any Act, Any Harm, to Anyone: The Transformative Potential of “Human Rights Impacts” under the UN Guiding Principles on Business and Human Rights’ (2019) *University of Oxford Human Rights Hub Journal*, 120, 122.

⁴⁷ Pörtner et al, *note 6*, 5.

⁴⁸ Michael Burger, Jessica Wentz and Radley Horton, ‘The Law and Science of Climate Change Attribution’ (2021) *Environmental Law Reporter* 10646.

⁴⁹ Marjanac and Patton, *note 18*; Ekwurzel et al, *note 18*.

⁵⁰ Debevoise and Plimpton, ‘Practical Definitions of Cause, Contribute and Directly Linked to Inform Business Respect for Human Rights’ cited in Macchi and Bernaz, *note 29*, 10.

⁵¹ Macchi and Bernaz, *note 29*, 10.

Assessing ‘contribution’ is, however, more straightforward with regard to the so-called ‘carbon majors’, the approximately 100 companies responsible for around 70 per cent of global emissions, whose proportionate contribution to aggregate global GHG emissions has been quantified.⁵² Macchi and Bernaz argue – and my analysis concurs – that these ‘carbon majors’, especially the companies with the highest proportionate contribution, can be understood to have contributed to climate change, and thus also the resulting climate-related human rights impacts.⁵³

There are similar challenges involved in determining when the GHG emissions from a proposed project or development are of a sufficient quantity or level such that they could be considered to be ‘contributing’ to climate change within the meaning of the UNGPs. Macchi and Bernaz argue that any new projects or project expansions that give rise to significant amounts of GHG emissions or perpetuate unsustainable models of energy production could be understood as ‘contributing’ to climate change, as understood by the UNGPs.⁵⁴ Nonetheless their formulation still leaves open the contestable question of what constitutes a ‘significant amount’ of GHG emissions. For example, judges in domestic administrative law cases have taken very different approaches to the question of whether the impact or harm caused by a project is sufficiently direct and significant to affect the grant approval for that project.⁵⁵

Similar considerations arise and similar challenges are encountered in determining whether a business’ operations, products and services can be ‘directly linked’ to climate-related human rights impacts through business relationships. Macchi and Bernaz have provided a useful clarification of the responsibilities of banks in this context.⁵⁶ However, given that wide range of different business operations, products and services that are ‘linked to’ climate-related human rights impacts to different degrees, similar complex problems of quantification and/or underlying normative questions are arguably engaged.

Reference to international climate objectives can also provide importance guidance, namely, that companies should be required, at minimum, to reduce their GHG emissions in line with the Paris Agreement’s temperature targets.⁵⁷ However, business claims that they are, or plan to be, ‘net zero’ require further interrogation given the ‘accounting risk’ and integrity concerns and the risk of greenwashing the concept of ‘net zero’ raises (see section III, ‘Conceptual Ambiguities of Climate Due Diligence’).

The growing expectation is that companies have a ‘transition plan’, namely, a ‘time-bound action plan that clearly outlines how an organization will pivot its existing assets, operations, and entire business model towards a trajectory that aligns with the latest and most ambitious climate science recommendations’.⁵⁸ There are now various frameworks and initiatives related to climate transition plans, as well as the articulation of the characteristics and key elements of credible transition plans, and the principles that could guide their development.⁵⁹

⁵² Heede, note 16; Carbon Accountability Institute, note 17. Birchell, ‘Irremediable Impacts and Unaccountable Contributors’, note 42, 432–433.

⁵³ Macchi and Bernaz, note 29, 10.

⁵⁴ *Ibid.*, 11.

⁵⁵ See discussion in Julia Dehm, ‘Coal Mines, Carbon Budgets and Human Rights in Australian Climate Litigation: Reflections on *Gloucester Resources Limited v Minister for Planning*’ (2020) 26:2 *Australian Journal of Human Rights* 244.

⁵⁶ Macchi and Bernaz, note 29.

⁵⁷ Macchi, note 2, 97, referring also to the ‘Joint Summary of the Amicus Curiae in Re; National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People’.

⁵⁸ CDP, *CDP Technical Note: Reporting on Climate Transition Plans* (London: CDP, 2023), 7. See also CDP, *Climate Transition Plan: Discussion Paper* (London: CDP, 2021).

⁵⁹ *Ibid.*

Finally, given that all human activities contribute to some degree to global emissions – including rights-promoting activities such as constructing houses for persons without homes⁶⁰ – any assessment of whether a company’s GHG emissions ‘contribute’ to climate change and the actions it should take to ‘cease or prevent its contribution’ or to ‘use its leverage to mitigate any remaining impacts to the greatest extent possible’ calls for an engagement with broader climate justice questions: *who* should be permitted to emit *how much* and for *what purposes*. As the international climate regime is underpinned by the principle of ‘common but different responsibilities and respective capabilities’, such a determination also calls for an assessment of the business entities’ historical contribution to GHG emissions.⁶¹ Dealing with such normative questions in essence requires engaging with an underlying vision of what constitutes a just right-based transition to a low carbon society that takes into account the differentiated responsibilities that differently situated actors have.

Mandatory Climate Due Diligence

Alongside the UNGPs, several jurisdictions have now adopted mandatory HRDD legislation.⁶² The European Union’s proposed Corporate Sustainability Due Diligence Directive (CSDDD) on environmental and human rights due diligence could be a ‘unique opportunity to promote a shared understanding of the human rights and environmental law principles that underpin due diligence’ and to ‘g[o] beyond the element of disclosure and require[e] full integration of climate due diligence across business policies and practice’.⁶³ The CSDDD is framed as a part of the European Union’s broader ‘transition to a climate-neutral and green economy’ and as ‘in line with the European Green Deal’.⁶⁴ The proposal would require those companies subject to the Directive to adopt environmental and HRDD policies and implement HRDD processes. However, the Annex to the proposal does not explicitly reference the Paris Agreement or the United Nations Framework Convention on Climate Change in its list of violations of internationally recognized objectives and prohibitions included in environmental conventions. Nor does it require the covered companies to conduct HRDD in relation to climate change. Rather, the proposed CSDDD stipulates that covered companies:

shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company’s operations.⁶⁵

At the time of writing, due to ongoing debate between the European Commission and the European Parliament, there remains considerable uncertainty about the final provisions of

⁶⁰ See Human Rights Council, ‘Towards a Just Transformation: Climate Crisis and the Right to Housing’, A/HRC/52/28 (23 December 2022).

⁶¹ United Nations Framework Convention on Climate Change, UNTS 1771 (adopted 9 May 1992, entered into force 21 March 1994), art 3.3.

⁶² Deva, *note 1*.

⁶³ Macchi, *note 2*, 117.

⁶⁴ European Commission, ‘Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence Amending Directive (EU) 2019/1937’, 2022/0051 (23 February 2022).

⁶⁵ CSDDD, Art 15(1).

the Directive with many unresolved issues.⁶⁶ Given this uncertainty, it is premature to provide a detail evaluation of the proposal.

III. Limitations of Climate Due Diligence

This section outlines four different critiques of climate due diligence: (i) the *insufficiency* of climate due diligence to fully ensure corporate respect to human rights in the context of climate change; (ii) the *conceptual ambiguity* regarding what standard of conduct climate due diligence imposes; (iii) *operational limitations* in conducting climate due diligence due to the spatially and temporally dispersal of climate-related human rights impacts; and (iv) *structural limitations* of climate due diligence given the political and economic powers of the corporate actors overwhelmingly responsible for climate-related human rights impacts, namely, the fossil fuel industry.

Insufficiency of Climate Due Diligence

Several recent developments concerning business, climate change and human rights (discussed below) have not only consolidated the consensus around the corporate responsibility to conduct climate due diligence, but also underscored that climate due diligence is merely the starting point and articulated more expansive business responsibilities. Moreover, given the growth in both rights-based climate litigation⁶⁷ and climate litigation cases addressing corporate responsibility for climate harms,⁶⁸ it is likely that even more expansive corporate obligations in relation to the climate-related human rights impacts of their business operations will be articulated in the future.⁶⁹

In a 2019 report, the Special Rapporteur on human rights and the environment described compliance with the UNGPs as a ‘first step’ but also identified further business responsibilities including: reduce GHG emissions from their activities, their subsidiaries and their products and services, ‘ensure that people affected by business-related human rights violations have access to effective remedies’, and ‘support, rather than oppose, public policies intended to effectively address climate change’.⁷⁰

The 2021 ruling of the Hague District Court in the Netherlands in *Milieudefensie v Dutch Royal Shell* (currently under appeal) required Shell to reduce their net GHG emissions across

⁶⁶ See Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 – General Approach’ (30 November 2022); Catalina Hierro and Isabella Kelly, ‘The European Corporate Sustainability Due Diligence Directive: It’s a Marathon, Not a Sprint’, *Herbert, Smith, Freehills* (4 April 2023), <https://www.herbertsmithfreehills.com/latest-thinking/the-european-corporate-sustainability-due-diligence-directive-its-a-marathon-not-a> (accessed 29 April 2023).

⁶⁷ For an overview of rights-based climate litigation, see Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Litigation?’ (2018) 7:1 *Transnational Environmental Law* 37; César Rodríguez-Garavito, ‘Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action’ in César Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge: Cambridge University Press, 2022); Annalisa Savaresi and Joana Setzer, ‘Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers’ (2022) 13:1 *Journal of Human Rights and the Environment* 7.

⁶⁸ See Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’ (2018) *Oxford Journal of Legal Studies* 1; Joana Setzer, ‘The Impact of High-Profile Litigation against Major Fossil Fuel Companies’, in Rodríguez-Garavito (ed), *note 67*, 206.

⁶⁹ Mikko Rajavuori, Annalisa Savaresi and Harro van Asselt, ‘Mandatory Due Diligence Laws and Climate Change Litigation: Bridging the Corporate Climate Accountability Gap?’ (2023) *Regulation & Governance*, <https://doi.org/10.1111/rego.12518> (accessed 28 April 2023).

⁷⁰ General Assembly, ‘Human Rights Obligations’, *note 11*.

their operations 45 per cent by 2030 from 2019 levels.⁷¹ While the decision was based on unwritten duty of care, codified in the Dutch Civil Code, the court also referred to the UNGPs, which it described as ‘suitable as a guideline in the interpretation of the unwritten standard of care’.⁷² The court used the rationale underpinning the UNGPs’ approach to ‘business relationships’ to show how Shell has control and influence over the Scope 3 emissions of its customers, because it can determine the overall energy package of the Shell group. The court thus held that Shell must ‘genuinely take responsibility’ for the Scope 3 emissions of its customers⁷³ and that it was subject to a ‘best-efforts obligation’ to reduce the GHG emissions by the end-users of its product.⁷⁴

In 2022, the Commission on Human Rights of the Philippines found that major fossil fuel companies could be held liable for climate-related human rights impacts.⁷⁵ In its report, *National Inquiry on Climate Change*, the Commission identified – drawing on Pillar II of the UNGPs – what businesses enterprises must do in the context of climate change.⁷⁶

The Commission found that businesses enterprises, including their value chains, that were within the jurisdiction of the Philippines, ‘may be compelled to undertake human rights due diligence and held account for failure to remediate human rights abuses arising from their business operations’.⁷⁷ However, more importantly, it made recommendations that went beyond climate due diligence: that ‘carbon majors’ desist from activities that undermine climate science; cease further exploration of new oil fields, keep fossil fuels in the ground and transition to clean energy; contribute to a Green Climate Fund for the implementation of mitigation and adaptation measures; and to continually engage with experts, civil society and other stakeholders to assess and continually improve the corporate response.

These developments affirm the consolidating consensus around climate due diligence, but also highlight the need for further actions and policies to ensure corporate respect to human rights in the context of climate change. Given how climate litigation is strengthening corporate climate accountability frameworks,⁷⁸ it is likely that pending and future climate litigation will lead to the articulation of more stringent corporate climate accountability standards over time.

In fact, HRDD was never envisioned as a ‘silver bullet’ that could single-handedly transform corporate behaviour; rather it was always envisioned as one tool within a broader polycentric governance structure that includes a mix of binding and non-binding instruments.⁷⁹ However, in a context where considerable attention has been focused on HRDD responsibilities, it is crucial to recall, as Surya Deva highlights, that HRDD should be ‘treated [as] merely one of the many means to ensure businesses respect internationally recognized human rights’.⁸⁰ In the context of climate change, it is particularly crucial that ‘mandatory HRDD laws should be part of a wider regulatory menu instead of being the only item on the menu’.⁸¹ Section IV, will show how this critique of the insufficiency of climate due diligence can be addressed by complementing climate due diligence with additional,

⁷¹ *Milieudefensie v Royal Dutch Shell*, District Court of the Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5339.

⁷² *Ibid*, para 4.4.11.

⁷³ *Ibid*, para 4.4.19.

⁷⁴ *Ibid*, para 4.1.4.

⁷⁵ Commission on Human Rights of the Philippines, ‘National Enquiry on Climate Change Report’ (2022).

⁷⁶ *Ibid*, 94–95.

⁷⁷ *Ibid*, 114.

⁷⁸ Rajavuori, Savaresi and van Asselt, note 69.

⁷⁹ I am indebted to an anonymous reviewer for this insight.

⁸⁰ Deva, note 1, 390.

⁸¹ *Ibid*, 414.

broader regulatory reforms that draw clear ‘red lines’ to prevent and phase out fossil fuel development and reduce the disproportionate power of the fossil fuel industry.

Conceptual Ambiguities of Climate Due Diligence

Section II discussed numerous challenges in precisely delineating the standard of conduct climate due diligence imposes, especially quantifying what level of GHG emissions would give rise to a determination that a company or project ‘contributed’ to climate change within the meaning of the UNGPs. Moreover, there are complex normative and distributional questions that are unavoidable when assessing what constitutes a ‘significant contribution’ to climate change or what action a business should take to ‘cease or prevent its contribution’. Given that climate justice demands a more situated and contextualized analysis that considers questions of historical responsibility and an assessment of how specific action contributes to a just rights-based transition away from fossil fuel dependency and towards a low-carbon society, targets or the actions taken to ‘cease or prevent contribution’ cannot be prescribed universally.⁸² It is, however, possible to prescribe some clear criteria about what would constitute a credible transition plan and ambitious action, that is attentive to the differentiated responsibilities of differentially situated actors.

The earlier discussion also highlighted the potential obfuscation that corporate claims that they are, or will be, ‘net zero’ and that their GHG emissions are, or will be, ‘offset’ or ‘neutralized’ emissions may cause. This sub-section further elaborates on some of the formulation of corporate climate pledges may complicate questions of responsibility. These problems arise both due to flexibility inherent in the concept of ‘net zero’ and also the lack of ‘clear differentiation or sequencing hierarchy’ between mitigation and prevention in the UNGPs which ‘creates the impression that businesses may be justified to cause or contribute to adverse human rights impacts as long as they take certain steps to mitigate such impacts’.⁸³

In the aftermath of the 2015 Paris Agreement, the concept of ‘net zero’ has ‘rapidly become the new organizing paradigm of climate change law’,⁸⁴ with at least 120 countries, 1,000 cities and 5,000 business committed to net zero.⁸⁵ By 2023, 929 companies on the Forbes 2,000 list have net zero targets, a large increase from December 2020, when only 417 of the Forbes 2,000 had such a target.⁸⁶ However, there are numerous concerns about the integrity of how specific net zero targets are formulated, and also about the integrity of ‘net zero’ approaches. First, there are implementation concerns given that 65 per cent of such corporate targets do not meet minimum procedural reporting requirements.⁸⁷ In 2023, only 4 per cent of corporate targets met the criteria set by the UN Race to Zero campaign, namely, that they set a specific target, cover Scope 1, 2 and 3 emissions, set clear conditions on the use of offsets, publish a plan, implement immediate emission-reduction measures and report on interim and longer-term targets.⁸⁸

⁸² For a critique of universality, see Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

⁸³ Deva, note 1, 399.

⁸⁴ Shelley Welton, ‘Neutralizing the Atmosphere’ (2022) 132 *The Yale Law Journal* 171.

⁸⁵ *Ibid.*, 189.

⁸⁶ Net Zero Tracker, ‘Net Zero Target’s Among World’s Largest Companies Doubles, But Credibility Gap Undermines Progress’ (12 June 2023), <https://zerotracker.net/insights/net-zero-targets-among-worlds-largest-companies-double-but-credibility-gaps-undermine-progress> (accessed 16 June 2023).

⁸⁷ Net Zero Tracker, ‘New Zero Stocktake 2022’ (13 June 2022), <https://zerotracker.net/insights/pr-net-zero-stocktake-2022> (accessed 28 April 2023).

⁸⁸ Net Zero Tracker, note 86.

Second, there are concerns about ‘accounting risks’ associated with ‘net zero’ given the flexibility it allows with regard to the scope of emissions covered, the temporality of net zero and the presumption of fungibility and exchangeability of carbon reductions and removals by sinks, and thus the potential for ‘greenwashing’.⁸⁹ Regarding scope, the key concern is that many pledges only include Scope 1 and 2 emissions, and Scope 3 emissions, or ‘all indirect emissions that occur in the value chain’,⁹⁰ are frequently neglected, even though they often constitute the largest proportion of the GHG footprint of an organization.⁹¹

Third, the time frame for achieving ‘net zero’ pledges, which is often 2050, potentially legitimates delay,⁹² and ‘net zero’ strategies may rely on assumption about the future use of technology that may not be socially, economically or technologically viable, such as carbon capture and storage or other negative emissions technologies.⁹³

Fourth, the language of ‘net zero’ legitimates the use of ‘offsets’ even though many offsets have been shown to lack environmental credibility and cause social harms to local communities.⁹⁴ Given that purchasing an ‘offset’ does not extinguish a company’s responsibility to address its contribution to climate change,⁹⁵ and that business responsibilities to respect human rights also apply to ‘offsets’ purchased by a company,⁹⁶ a deeper examination of such ‘net zero’ pledges is required. ‘Net zero’ has therefore been described by some as a ‘dangerous trap’ that ‘helps perpetuate a belief in technological salvation and diminishes the sense of urgency surrounding the need to curb emissions now’.⁹⁷

Although there is growing concern about the ‘accounting risks’ and risk of ‘greenwashing’ associated with ‘net zero’ pledges, to date there has limited engagement with how these critiques should inform standards of climate due diligence. For example, the ruling in *Milieudefensie v Dutch Royal Shell* allowed Shell to use offsets to achieve their court-ordered emission reductions,⁹⁸ and Shell had planned to invest \$450 million annually in offsets, the equivalent of half the current market for offsets.⁹⁹ Concerns about the integrity of ‘net zero’ pledges has given rise to a proliferation of private standard-setting organizations with their

⁸⁹ Welton, note 84, 195.

⁹⁰ ‘Greenhouse Gas Protocol’, https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf (accessed 28 April 2023).

⁹¹ Mo Li, Thomas Wiedmann and Michalis-Hadjikakou, ‘Enabling Full Supply Chain Corporate Responsibility: Scope 3 Emissions Targets for Ambitious Climate Change Mitigation’ (2020) 54:1 *Environmental Science & Technology* 400.

⁹² Welton, note 84, 187.

⁹³ Will Carton, ‘Carbon Unicorns and Fossil Futures. Whose Emission Reduction Pathway is the IPCC Performing?’, in JP Sapinski, Holly Jean Buck and Andreas Malm (eds), *Has It Come to This?: The Promises and Perils of Geoengineering on the Brink* (New Brunswick: Rutgers University Press, 2020), 34.

⁹⁴ Wim Carton, Jens Friis Lund, and Kate Dooley, ‘Undoing Equivalence: Rethinking Carbon Accounting for Just Carbon Removal’ (2021) 3 *Frontiers in Climate* 30; Patrick Greenfield, ‘Revealed: More Than 90% of Rainforest Carbon Offsets by Biggest Provider are Worthless, Analysis Shows’, *The Guardian* (18 January 2023), <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe> (accessed 28 April 2023); Julia Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (Cambridge: Cambridge University Press, 2021).

⁹⁵ Macchi, note 2, 113.

⁹⁶ Damilola S Olawuyi, ‘Climate Justice and Corporate Responsibility: Taking Human Rights Seriously in Climate Action Projects’ (2016) 34:1 *Journal of Energy & Natural Resources Law* 27.

⁹⁷ James Dyke, Robert Watson and Wolfgang Knorr, ‘Climate Scientists: Concept of Net Zero is a Dangerous Trap’, *The Conversation* (22 April 2021), <https://Theconversation.com/Climate-Scientists-Concept-of-Net-Zero-Is-Adangerous-Trap-157368> (accessed 28 April 2023).

⁹⁸ *Milieudefensie v Dutch Royal Shell*, note 71.

⁹⁹ Alex Lawson and Patrick Greenfield, ‘Shell to Spend \$450m on Carbon Offsetting as Fears Grow Credits Might be Worthless’, *The Guardian* (19 January 2023), <https://www.theguardian.com/environment/2023/jan/19/shell-to-spend-450m-on-carbon-offsetting-fears-grow-credits-worthless-aoe> (accessed 28 April 2023).

own criteria, guidelines and best-practice to ‘separate the net-zero wheat from the chaff’.¹⁰⁰ Due to concerns about the integrity of offsets, the United Nations Secretary-General António Guterres established in a High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, which in 2022 presented its report, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions*, made several important recommendations.¹⁰¹ It recommended that ‘net zero’ pledges must be aligned with scenarios to limit warming to 1.5°C, have ‘no or limited overshoot’, cover the entire value chain of the business, ‘start fast and not delay action’.¹⁰² The report highlighted the need for ‘urgent and deep reductions of emissions across the value chain’ and that offsets should not be used for meeting 1.5°C targets, although there was some scope for ‘high integrity carbon credits’ for efforts exceeding 1.5°C targets.¹⁰³ Crucially, it stressed that ‘net zero plans must not support new fossil fuels: there is no room for new investment in fossil fuel supply and there is a need to decommission and cancel existing assets’.¹⁰⁴

The critique that the climate due diligence suffers from conceptual ambiguity does not call for its abandonment. Rather, it highlights that for climate due diligence to be rigorous and credible, there needs to be the attribution of clear and precise standards to guide an assessment of whether corporate activity is ‘significantly contributing’ to climate change and some prescribed, clear criteria about what constitutes a credible transition plan and ambitious climate action.¹⁰⁵ Section IV will show this need for clear and precise standards can be addressed by regulatory reforms that draw clear ‘red lines’ to prevent and phase out fossil fuel development and reduce the power of the fossil fuel industry.

Operational Limitations in Conducting Climate Due Diligence

This sub-section explores the operational limitations in conducting climate due diligence due to the spatially and temporally dispersal of climate-related human rights impacts. A practical problem that may arise in operationalizing climate due diligence is the risk that analysis of the climate-change related human rights impacts *caused* by the company might in practice be confused with, or deprioritized compared with, the climate risks *to* the company. Over the past decade, there has been growing awareness of the transition and physical risks that climate change presents for companies and debate on how companies and their directors should be required to disclose and manage these risks.¹⁰⁶ In 2017 the industry-led Task Force on Climate-related Financial Disclosures (TCFD) made influential recommendations about how such risks should be managed and disclosed by all financial sector organizations.¹⁰⁷ There is ongoing regulatory reform and litigation about the disclosure and management of climate risk: in the European Union non-binding guidelines on climate-related information¹⁰⁸ and the proposed EU Corporate Sustainability Reporting Directive;¹⁰⁹ in the United States the Security and Exchange Commission has proposed rules to require registrants to disclose information about

¹⁰⁰ Welton, note 84, 196.

¹⁰¹ High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (2022).

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ CDP, note 58.

¹⁰⁶ Carbon Tracker, *Unburnable Carbon: Are the World's Financial Markets Carrying a Carbon Bubble?* (2011).

¹⁰⁷ Taskforce on Climate-Related Financial Disclosure, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosure* (2017).

¹⁰⁸ European Commission, ‘Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information’, 2019/C 209/01 (20 June 2019).

¹⁰⁹ European Commission, note 64.

certain climate-related risks in their registration statements and periodic reports;¹¹⁰ in Australia, there has been litigation by shareholders and superannuation about the disclosure and management of climate-related risks.¹¹¹

While engagement with both climate risk to business and the climate-change related human rights impacts *caused* by the company is necessary as part of a ‘double materiality’ approach, it is also crucial to distinguish these two species of risks and prevent conflation between them.¹¹² Björn FASTERLING has analysed the problems that can arise from confusing or conflating a ‘human right risk’ (the risk that a company will contribute to human rights abuses) with a ‘social risk’ (the risk that people with a negative perception of the corporate activity could exercise their real or potential leverage to impact the business’ financial value).¹¹³ Given that both these species of climate-related risk could be addressed by broader enterprise risk management systems,¹¹⁴ there is a real danger that companies will conflate these risks in practice, or that corporations will focus primarily on the risk to themselves. These concerns are more acute if the company is subject to more stringent disclosure and management requirements in relation to the climate risks to the business than in relation to the climate-change related human rights impacts *caused* by the company.

However, a more fundamental operational limitation of climate due diligence arises due to the inequalities and ‘catastrophic’¹¹⁵ injustice climate change reflects and reproduces,¹¹⁶ and the temporal and spatial scope and dispersal of climate change impacts. As part of the process of HRDD, businesses are required to conduct ‘meaningful consultation with potentially affected groups and other relevant stakeholders’.¹¹⁷ As Surya Deva has critiqued, this requirement does ‘not adequately acknowledge or address the problems flowing from the imbalance of power, information and resources between business and rightsholders’.¹¹⁸ These concerns about inequalities of power, information and resources are even more acute when considering climate-related human rights impacts. The IPCC assessments show that people already in vulnerable situations – whether due to geography, poverty, age, gender, sex, disability, migration

¹¹⁰ US Securities and Exchange Commission, ‘SEC Proposes Rules to Enhance and Standardise Climate-Related Disclosures for Investor’ (21 March 2022), <https://www.sec.gov/news/press-release/2022-46> (accessed 28 April 2023).

¹¹¹ Esmeralda Colombo, ‘From Bushfires to Misfire: Climate-Related Financial Risk after *McVeigh v Retail Employees Superannuation Trust*’ (2021) 11:1 *Transnational Environmental Law* 173.

¹¹² The climate risks addressed by the TCFD are risk to the company, namely, the physical risks resulting from climate change ‘may have financial implications for organizations, such as direct damage to assets and indirect impacts from supply chain disruption’, or how the company’s ‘financial performance may also be affected by changes in water availability, sourcing, and quality; food security’ or how extreme temperature changes may affect the company’s premises, operations, supply chain, transport needs, and employee safety. Taskforce on Climate-related Financial Disclosure, note 101.

¹¹³ Björn FASTERLING, ‘Human Rights Due Diligence as Risk Management: Social Risk versus Human Rights Risk’ (2017) 2 *Business and Human Rights Journal* 225, 226.

¹¹⁴ Commentary to Principle 17 of the UNGPs states that HRDD ‘can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rightsholders’. UNGPs, note 26.

¹¹⁵ Office of the High Commissioner for Human Rights, ‘Open-Letter from the United Nations High Commissioner for Human Rights on Priorities for Human Rights-Based Climate Action at the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change’ (2 November 2022), <https://www.ohchr.org/sites/default/files/2022-11/2022-11-02-HC-Open-Letter-to-UNFCCC-COP27.pdf> (accessed 28 April 2023).

¹¹⁶ United Nations Development Programme, *Climate Change and Human Development: Harnessing Emerging Opportunities* (New York: United Nations Development Programme, 2013).

¹¹⁷ UNGPs, note 26, Principle 18.

¹¹⁸ Deva, note 1, 400.

status, religion, race and cultural or ethnic background – are most exposed to the impact of climate change.¹¹⁹ Such concerns are particularly pronounced with vulnerable groups such as children, who have a limited capacity to understand or evaluate risks or effectively participate in consultations.¹²⁰

Moreover, the temporally and geographically dispersal of climate change impacts makes operationalizing any sort of meaningful consultation with potentially affected groups almost impossible. Climate change, like many environmental harms, is marked by a ‘spatio-temporal unboundedness’ and ‘time-space distantiation’ where harmful effects are spatially and temporally dispersed from the actions that caused them¹²¹ and often manifest as ‘slow violence’.¹²² Moreover, the ‘planetary’ scale of the climate crisis, means that everyone currently alive could be potentially impacted, albeit differently.¹²³ Climate change will also impact future generations and in turn give rise to intergenerational obligations,¹²⁴ but it is operationally difficult to meaningfully consult with the ‘not-yet born’ who have been described as ‘an indefinite population of virtual humans, a cast of projected “anthro-potentialities”’.¹²⁵ Thus, the possibility of consultation with stakeholders, let alone meaningful consultation that is attentive to existing inequalities of power and knowledge, faces almost insurmountable operational challenges when confronted with the ‘hyperobjects’ of climate change.¹²⁶

These operational limits of climate due diligence therefore highlight the need for methods of promoting corporate climate accountability that go beyond HRDD. Section IV will argue that regulatory reforms that draw clear ‘red lines’ to prevent and phase out fossil fuel development and reduce the power of the fossil fuel industry can provide such an alternative.

Structural Limitations of Climate Due Diligence

This final sub-section identifies two key structural limitations of climate due diligence, namely, its inability to question certain business practices, such as continued burning of fossil fuels, and its ineffectiveness in contesting the business model of fossil fuel companies. This argument builds on Deva’s critique that HRDD and the framework of the UNGPs is unable to properly challenge or dismantle the ‘existing structures of irresponsibility and

¹¹⁹ Human Rights Council, ‘The Impact of Climate Change on the Human Rights of People in Vulnerable Situations’, A/HRC/50/57 (6 May 2022), para 45.

¹²⁰ On the children rights issues raised by climate change, see UNICEF, *The Climate Crisis is a Child Rights Crisis: Introducing the Children’s Climate Risk Index* (UNICEF, 2021); Committee on the Rights of the Child, ‘Decision Adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019’, CRC/C/88/D/104/2019 (11 November 2021), para 10.13.

¹²¹ Barbara Adam, *Timescapes of Modernity: The Environment and Invisible Hazards* (New York: Routledge, 1998).

¹²² Robert Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, MA: Harvard University Press, 2011), 2.

¹²³ Dipesh Chakrabarty, ‘Planetary Crisis and the Difficulties of Being Modern’ (2018) 46:3 *Millennium: Journal of International Studies* 259.

¹²⁴ Henry Shue, ‘Changing Images of Climate Change: Human Rights and Future Generations’ (2014) 5 *Journal of Human Rights and the Environment* 50, 63; Richard Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge: Cambridge University Press, 2009), 5.

¹²⁵ Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley, ‘Chronocenos: An Introduction to Power and Time’, in Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley (eds), *Power and Time: Temporalities in Conflict and the Making of History* (Chicago: University of Chicago Press, 2021), 21.

¹²⁶ Timothy Morton, *Hyperobjects: Philosophy and Ecology after the End of the World* (Minneapolis: University of Minnesota Press, 2023).

inequality utilized by business to their advantage'.¹²⁷ This is due in part to how the UNGPs are not underpinned by legally binding obligations,¹²⁸ but rather based on a 'transitional social norm'.¹²⁹ The polycentric model of governance that underpins the UNGPs is premised on a framework that calls on business to discharge their responsibility to 'account for' their social impacts by asking them to 'know and show' their adverse impacts, rather than by imposing legally binding obligations to ensure specific outcomes. HRDD, as McCorquodale and Nolan identify, 'by itself does not include liability or enforcement, and reporting or transparency without liability and enforcement is rarely effective as a means of changing conduct'.¹³⁰ Instead, the framework assumes that 'transparency gained from corporate reporting will provide greater visibility of supply chain risks to investors and consumers and in turn incentivize corporate action', although as Justine Nolan shows, this assumption is questionable.¹³¹ This focus on transparency and disclosure reflects a 'quintessentially neoliberal modality of governance' in its 'prioritization of market discipline underpinned by risk disclosure'.¹³² As has long been recognized, there is a real risk that HRDD will 'degenerate into a "tick-box" exercise designed for public relations purposes'¹³³ or that there would simply be 'cosmetic compliance'.¹³⁴

Moreover, the UNGP framework does not challenge the broader legal framework that authorizes and enables corporate irresponsibility, nor the corporate form itself. As Penelope Simons has identified, the focus of the UNGPs on addressing 'governance gaps' fails to interrogate how international law, especially international trade and investment law, is implicated in *producing* those gaps.¹³⁵ Thus, a broader corporate accountability agenda would need to interrogate how existing legal structures enable corporate irresponsibility and the production of structural inequalities of power and wealth. Brinks et al argue that promoting corporate accountability also requires 'understanding the structural dynamics of uneven development and the inequitable allocation of value and power within supply chains, as well as developing initiatives to redress these inequalities'.¹³⁶

Although 86 per cent of global carbon emissions come from burning of coal, oil and gas,¹³⁷ the UNGP framework does not ask fundamental question about the compatibility of continuing fossil fuel development and the realization of human rights. As Deva identifies, the UNGPs 'do not ask whether it is even practicable to respect human rights

¹²⁷ Deva, note 1, 401.

¹²⁸ Joseph and Kyriakakis, note 25.

¹²⁹ Ruggie and Shermann, note 21, 923.

¹³⁰ Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 *Netherlands International Law Review* 455, 469.

¹³¹ Justine Nolan, 'Closing the Gaps in the Chain: Regulating Respect for Human Rights in Global Supply Chains and the Role of Multistakeholder Initiatives', in Daniel Brinks, Julia Dehm, Karen Engle and Kate Taylor (eds), *Power, Participation and Private Regulatory Initiatives: Human Rights in Supply Chain Capitalism* (Philadelphia: University of Pennsylvania Press, 2021) 35.

¹³² Brett Christophers, 'Climate Change and Financial Instability: Risk Disclosure and the Problematics of Neoliberal Governance' (2017) 107:5 *Annals of the American Association of Geographers* 1108.

¹³³ Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22:1 *Business Ethics Quarterly* 145, 158.

¹³⁴ Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 *Melbourne Journal of International Law* 221.

¹³⁵ Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3:1 *Journal of Human Rights and the Environment* 5.

¹³⁶ Daniel Brinks et al, 'Private Regulatory Initiatives, Human Rights and Supply Chain Capitalism', in Brinks et al (eds), note 131, 4.

¹³⁷ Valérie Masson-Delmotte et al (eds), *Climate Change 2021: The Physical Science Basis – Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2021).

within certain business models or certain situations and place'.¹³⁸ Rather, the underlying assumption that is 'all business models and all business practices are acceptable as long as a HRDD process ... is in place'.¹³⁹ Yet, the climate crisis has made evident that climate just futures require a rapid transition away from fossil fuel dependency: as UN Secretary-General stated plainly '[o]ur addiction to fossil fuels is killing us'.¹⁴⁰ He has spoken plainly to fossil fuel companies, telling them that '[y]our core product is our core problem'.¹⁴¹ He has also described the fossil fuel industry's business model as 'inconsistent with human survival',¹⁴² condemned the 'grotesque greed' of the fossil fuel industry and highlighted the immorality of making record profits 'at a massive cost to the climate'.¹⁴³ The business model of the fossil fuel industry is fundamentally incompatible with the UNGPs.

A further limitation of climate due diligence is that it fails to grapple with the massive political and economic power exercised by 'carbon majors' and how they have promoted misinformation and influenced policy to undermine climate policy and protect their interests. The co-regulatory model that HRDD is based on is only effective if it is 'not only be supported by business but also implemented by them'.¹⁴⁴ Instead, the corporate actors most responsible for the climate crisis have, for decades, cast doubt on climate science and opposed efforts to regulate GHG emissions. The governance model underpinning the UNGPs is ineffective in contesting the business model of the fossil fuel industry and the disproportionate political and economic power wielded by these corporate entities. Instead, powerful corporate entities have been able to influence and shape the rules to ensure that they serve their interests.¹⁴⁵ Thus, we need to interrogate how private and public regulatory frameworks are themselves shaped by, and thus reflective of, the inequalities and disparities in wealth and power that characterize the global economy.¹⁴⁶

The fossil fuel industry has made extraordinary profits from the extraction, circulation and combustion of fossil fuel, according to some analysis USD52 trillion or USD2.8 billion in profit daily over 50 years.¹⁴⁷ Ambitious climate policy consistent with the Paris Agreement objectives would not just threaten future profits, but could also cause up to USD1.6 trillion in fossil fuel assets becoming 'stranded'.¹⁴⁸ It is therefore unsurprising that growing concern

¹³⁸ Deva, note 1, 402.

¹³⁹ Ibid.

¹⁴⁰ United Nations, 'Secretary-General's Video Message to the World Government Summit' (30 March 2022), <https://www.un.org/sg/en/content/sg/statement/2022-03-30/secretary-generals-video-message-the-world-government-summit> (accessed 28 April 2023).

¹⁴¹ Michelle Nichols, 'For 2023, UN Chief Amplifies Warnings on Ukraine, Climate', *Reuters* (6 January 2023), <https://www.reuters.com/world/2023-un-chief-amplifies-warnings-ukraine-climate-2023-02-06/> (accessed 28 April 2023).

¹⁴² Ivana Kottasová, "'Inconsistent with Human Survival": UN Chief Slams Fossil Fuel Industry Expansion in Davos Speech', *CNN* (18 January 2023), <https://www.cnn.com/2023/01/18/business/davos-climate-un-warning-fossil-fuels-intl/index.html> (accessed 28 April 2023).

¹⁴³ Matthew Taylor, "'Grotesque Greed": Immoral Fossil Fuel Profits Must be Taxed, says UN Chief', *The Guardian* (3 August 2022), <https://www.theguardian.com/environment/2022/aug/03/greed-of-fossil-fuel-companies-is-grotesque-says-un-secretary-general> (accessed 28 April 2023).

¹⁴⁴ McCorquodale and Nolan, note 130, 464.

¹⁴⁵ See, e.g., Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (Viking Press Inc, 2013).

¹⁴⁶ Brinks et al, note 136.

¹⁴⁷ Damian Carrington, 'Revealed: Oil Sectors "Staggering" \$3bn-a-day Profits for Past 50 Years', *The Guardian*, (21 July 2022), <https://www.theguardian.com/environment/2022/jul/21/revealed-oil-sectors-staggering-profits-last-50-years> (accessed 28 April 2023).

¹⁴⁸ Carbon Tracker Initiative, *Mind the Gap: The \$1.6 Trillion Energy Transition Risk* (2018). See also Julia Dehm, 'Legally Constituting the Value of Nature: The Green Economy and Stranded Assets', in Isabel Feichtner and Geoff Gordon (eds), *Constitutions of Value: Law, Governance and Political Economy* (Abingdon: Routledge, 2023), 255.

about anthropocentric climate change and the prospect of international and domestic climate policy was seen by the fossil fuel industry as an existential threat. The industry responded to this perceived threat with well-funded, carefully orchestrated campaigns of misinformation and public deception.¹⁴⁹ It is now extensively documented that fossil fuel companies have known about climate change since the at least the late 1970s,¹⁵⁰ were aware that it was anthropocentric and caused by the burning of fossil fuels,¹⁵¹ and that they ‘predicted global warming correctly and skilfully’.¹⁵² It is also well documented how ‘many of the world’s largest fossil fuel companies have knowingly worked to deceive the public about the realities and risks of climate change’¹⁵³ and that a coordinated and well-funded ‘climate change countermovement’ mounted a series of efforts to oppose reductions in carbon emissions.¹⁵⁴

In addition to misinformation campaigns, fossil fuel interests also sought high-level access to negotiations to manipulate outcomes¹⁵⁵ to ensure that climate regulation adopted was compatible with their interests. Climate civil society organizations have become increasingly concerned about how the ‘[t]he enormous influence of corporate lobbyists ... undermines democracy and all too frequently results in the postponement, weakening or blocking of urgently needed progress in international social and environmental justice issues’.¹⁵⁶ They have described ‘corporate capture is a primary obstacle to progress in the UN climate’¹⁵⁷ as it is ‘forcing a menu of false solutions into the centre of Paris Agreement negotiations and threatening its realization’.¹⁵⁸ In recent years, the number of corporate

¹⁴⁹ See Naomi Oreskes, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues of Tobacco Smoke to Global Warming* (Bloomsbury Press, 2010).

¹⁵⁰ Neela Banerjee, John H Cushman Jr, Lisa Song and David Hasemyer, ‘Exxon: The Road not Taken’, *InsideClimate News* (2015), <https://insideclimatenews.org/book/exxon-the-road-not-taken/> (accessed 2 April 2023); Matthew Green, ‘Lost Decade: How Shell Downplayed Early Warnings Over Climate Change’ *DeSmog* (31 March 2023), <https://www.desmog.com/2023/03/31/lost-decade-how-shell-downplayed-early-warnings-over-climate-change/> (accessed 28 April 2023); Geoffrey Supran and Naomi Oreskes, ‘Assessing ExxonMobil’s Climate Change Communications (1977–2014)’ (2017) 12:8 *Environmental Research Letters* 084019; Geoffrey Supran and Naomi Oreskes, ‘Rhetoric and Frame Analysis of ExxonMobil’s Climate Change Communication’ (2021) 4:5 *One Earth* 696; Christophe Bonneuil, Pierre-Louis Choquet and Benjamin Franta, ‘Early Warmings and Emerging Accountability: Total’s Responses to Global Warming, 1971–2021’ (2021) 71 *Global Environmental Change* 102386; Benjamin Franta, ‘Early Oil Industry Knowledge of CO₂ and Global Warming’ (2018) 8 *Nature Climate Change* 1024; David Anderson, Matt Kasper and David Pomerantz, *Utilities Knew: Documenting Electric Utilities’ Early Knowledge and Ongoing Deception on Climate Change From 1968–2017* (Energy and Policy Institute, 2017).

¹⁵¹ Shannon Hall, ‘Exxon Knew About Climate Change Almost 40 Years Ago’, *Scientific American* (26 October 2015), <https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/> (accessed 28 April 2023).

¹⁵² Geoffrey Supran, Stefan Rahmstorf and Naomi Oreskes, ‘Assessing ExxonMobil’s Global Warming Projections’ (2023) 379 *Science* 6628.

¹⁵³ Union of Concerned Scientists, *The Climate Deception Dossiers: Internal Fossil Fuel Industry Memos Reveal Decades of Corporate Disinformation* (2015).

¹⁵⁴ Robert J Brulle, ‘Advocating Inaction: A Historical Analysis of the Global Climate Coalition’ (2022) 32:2 *Environmental Politics* 185.

¹⁵⁵ Michael Slezak, ‘Fossil Fuel Companies Undermining Paris Agreement Negotiations – Report’, *The Guardian* (1 November 2017), <https://www.theguardian.com/environment/2017/nov/01/fossil-fuel-companies-undermining-paris-agreement-negotiations-report> (accessed 28 April 2023).

¹⁵⁶ Friends of the Earth International et al, ‘Ending Corporate Capture of the United Nations: Joint Civil Society Statement’ (2012), <https://www.foei.org/wp-content/uploads/2012/06/Statement-on-UN-Corporate-Capture-EN.pdf> (accessed 28 April 2023).

¹⁵⁷ Corporate Accountability, ‘Report: Paris Deal Threatened by Corporate Capture’ (1 November 2017), <https://corporateaccountability.org/media/report-paris-deal-threatened-corporate-capture-2/> (accessed 29 April 2023).

¹⁵⁸ *ibid.*

lobbyists at UN climate conferences has drastically grown, and such delegations outnumber frontline communities and country delegations.¹⁵⁹

Fossil fuel companies have now started utilizing bilateral and multilateral investment treaties to protect their interests, and to demand compensation for assets that become ‘stranded’ due to climate policies enacted by states.¹⁶⁰ In 2022, UK company Rockhopper Exploration was awarded damages of GBP210 million against Italy, because its licence to drill for oil was impacted by a ban on some offshore oil and gas projects.¹⁶¹ Even if ultimately unsuccessful, the prospect of legal action could have a chilling impact on states’ willingness to implement climate policy and ‘can enhance business’ position in negotiations with states’.¹⁶² Even more problematically, these legal strategies impose the costs of asset stranding onto states, and thus ultimately their citizens, allow the corporate actors who have profited from causing the climate crisis to receive compensation and divert state’s financial resources from ensuring that the increasingly inevitable-energy transition is rights-based, just and that the interests of vulnerable communities are protected.¹⁶³

The actions of many fossil fuel companies over the last half a century shows how the industry business model is fundamentally at odds with the assumptions of the co-regulatory model that underpins the UNGPs. This critique of the structural limitations of the climate due diligence thus highlights the need for more radical models of corporate accountability to address the root causes of climate change and to fundamentally challenge the fossil fuel industry whose activities have brought the ‘world close to “irreversible” climate breakdown’.¹⁶⁴

IV. Beyond Climate Due Diligence: Regulatory ‘Red Lines’

The four critiques of the emerging consensus around climate due diligence might seem to suggest quite different regulatory responses. While the first two critiques could be addressed by regulatory reforms to complement or provide additional guidance to climate due diligence, the latter two critiques call for a broader structural rethinking of regulatory frameworks for corporate accountability in the climate crisis. This section, however, argues that all four of these critiques can be addressed by regulatory reforms

¹⁵⁹ Matt McGrath, ‘COP26: Fossil Fuel Industry has Largest Delegation at Climate Summit’, *BBC News* (8 November 2021), <https://www.bbc.com/news/science-environment-59199484> (accessed 29 April 2023); Ruth Michaelson, “‘Explosion” in Number of Fossil Fuel Lobbyists at COP27 Summit’, *The Guardian* (10 November 2022), <https://www.theguardian.com/environment/2022/nov/10/big-rise-in-number-of-fossil-fuel-lobbyists-at-cop27-climate-summit> (accessed 29 April 2023).

¹⁶⁰ Uniper, ‘Uniper Seeks Judgement for the Future of Maasvlakta’ (16 April 2021), [uniper.energy/news/uniper-seeks-judgement-for-the-future-of-maasvlakta](https://www.uniper.energy/news/uniper-seeks-judgement-for-the-future-of-maasvlakta) (accessed 29 April 2023); Kyla Tienhaara, ‘We Need to Rethink Investment Treaties to Ensure a Rapid and Just Energy Transition’, *International Institute for Environment and Development* (22 April 2021), [iied.org/we-need-rethink-investment-treaties-ensure-rapid-just-energy-transition](https://www.iied.org/we-need-rethink-investment-treaties-ensure-rapid-just-energy-transition) (accessed 29 April 2023).

¹⁶¹ Arthur Nelson, ‘Oil Firm Rockhopper Wins £210m Payout After Being Banned From Drilling’, *The Guardian* (25 August 2022), <https://www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling> (accessed 29 April 2023).

¹⁶² Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action?: Investor–State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development, 2020); see also Kyra Bos and Joyeeta Gupta, ‘Stranded Assets and Stranded Resources: Implications for Climate Change Mitigation and Global Sustainable Development’ (2019) 56 *Energy Research & Social Science* 101215.

¹⁶³ Tienhaara and Cotula, *note 162*; Kyla Tienhaara et al, ‘Investor–State Dispute Settlement: Obstructing a Just Energy Transition’ (2022) *Climate Policy*, doi: 10.1080/14693062.2022.2153102 (accessed 28 April 2023).

¹⁶⁴ Carrington, *note 5*.

that draw clear ‘red lines’ to constrain or prevent business activities that are incompatible with a rights-based, just transition to a low-carbon society.¹⁶⁵

Deva has highlighted the value of ‘red lines’ as a corporate accountability measure and as a necessary precondition for effective mandatory HRDD laws.¹⁶⁶ He notes that there are ‘specific situations, circumstances or settings in which it may not be realistic to respect all human rights’.¹⁶⁷ Thus, he argues, ‘not conducting certain business activities, not entering certain markets from the outset or disengaging responsibly should be the way forward’ and suggests that states may need to draw such a ‘red line’ for fossil fuel corporations.¹⁶⁸ This section builds on these arguments and proposes two such ‘red lines’: (i) regulatory reforms to prevent or prohibit any new fossil fuel projects or the extension of existing fossil fuel projects; and (ii) regulatory reforms to prevent and address the harmful ‘corporate capture’ of regulatory institutions by fossil fuel interests. In addition to these regulatory reforms, changes to multilateral and bilateral investment treaties are needed so that international investment law no longer operates as a barrier to a just and right-based transition away from fossil fuel dependency.¹⁶⁹ There are growing calls for states to consider strategies for terminating investment treaties, including coordinated withdrawal or termination.¹⁷⁰ However, a discussion of the proposed reforms of international investment law is beyond the scope of this article.

Prohibit New Fossil Fuel Projects or Extensions of Projects

The science is clear: achieving the Paris Agreement objectives will require the majority of proven economically recoverable oil, gas and coal reserves to remain underground, unburnt. The International Energy Agency’s NetZero 2050 scenario shows that no new oil or gas fields or any new coal mine or mine extensions or new coal fired power stations should be approved for development after 2021, and existing coal-fired power stations need to be rapidly decommissioned.¹⁷¹ Analysis published in *Nature* in September 2021 found that in order to have a 50 per cent chance of limiting warming to 1.5°C, 60 per cent of oil and fossil methane gas, and 90 per cent of coal must remain unextracted.¹⁷² Therefore, most regions must peak production now or in the next decade and oil and gas production must decline globally by 3 per cent each year until 2050.¹⁷³ This conclusion has been affirmed by other

¹⁶⁵ Deva, note 1, 406.

¹⁶⁶ *Ibid.*, 18.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ See General Assembly, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change – Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation’, A/77/226 (26 July 2022), para 90(b), recommending the repeal of the Energy Charter Treaty.

¹⁷⁰ Lise Johnson et al, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law* (Columbia Center on Sustainable Investment, 2018); Columbia Center on Sustainable Investment, International Institute for Environment and Development and International Institute for Sustainable Development, ‘Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements – Submission to UNCITRAL Working Group III on ISDS Reform’ (15 July 2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_withdrawalconsent_0.pdf (accessed 29 April 2023); Client Earth, ‘Energy Charter Reform: Why Withdrawal is an Option’, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_withdrawalconsent_0.pdf (accessed 29 April 2023).

¹⁷¹ International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Paris: International Energy Agency, 2021).

¹⁷² Dan Welsby et al, ‘Unextractable Fossil Fuels in a 1.5°C World’ (2021) 597 *Nature* 230.

¹⁷³ *Ibid.*

studies that have shown that the emissions embedded in currently already operating oil, gas and coal fields and mines would already exceed the ‘carbon budget’ for limiting warming to 2°C.¹⁷⁴ This renders many planned and operational fossil fuel projects unviable: many operating fields and mines need to be closed before their economic lifetime is over and ‘no new fossil fuel extraction or transportation infrastructure should be built’.¹⁷⁵ Despite these warnings, the UNEP *Production Gap* report shows that governments have plans to produce more than double the amount of fossil fuels in 2030 than what would be consistent with limiting global warming to 1.5°C.¹⁷⁶

Within climate policy discussions, there is growing recognition of the need for ‘supply-side’ policies that address the production of fossil fuels to complement traditional ‘demand-side’ policies that address consumption.¹⁷⁷ Proposed ‘supply-side’ measures include a moratorium on new coal mines and a ‘Fossil Fuel Non-Proliferation Treaty’.¹⁷⁸ The 2021 ‘Glasgow Climate Pact’, called on countries to ‘accelerat[e] efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies’.¹⁷⁹ In March 2023 the UN Secretary-General called for an ‘all-hands-on-deck Acceleration Agenda’ that called on countries to commit to ambitious actions, including preventing new fossil fuel projects or expansions and phasing down fossil fuels.¹⁸⁰

Within human right discussions, there is a consolidating consensus about the necessity of equitably phasing out fossil fuels.¹⁸¹ In a 2021 article, Harro van Asselt argued that ‘it is not entirely clear to what extent state’s general obligations to respect, protect, and fulfil human rights can be translated into specific obligations with regard to fossil fuel production’.¹⁸² However, he suggests the work of UN-mandated human rights experts and treaty bodies can provide ‘normative guidance’.¹⁸³ The below discussion of relevant statements shows a growing acknowledgment of the incompatibility of human rights realization and continued fossil fuel development.

In 2022 the Special Rapporteur on human rights in the context of climate change recommended that the General Assembly should ‘[p]ass a resolution to ban any further development of fossil fuel mining and other harmful mitigation actions’.¹⁸⁴ In 2020 the Independent Expert on human rights and solidarity highlighted that fossil fuel exploitation must be ‘radically transformed to avoid further dangerous climate change’ and that the continued investment in, subsidization and exploitation of fossil fuels ‘imperil[s] the

¹⁷⁴ Greg Muttitt, *The Sky’s the Limit: Why the Paris Climate Goals Require a Managed Decline of Fossil Fuel Production* (Oil Watch International, 2016), 5.

¹⁷⁵ *Ibid.*

¹⁷⁶ United Nations Environment Programme, *2021 Production Gap Report* (Nairobi: United Nations Environment Programme, 2021).

¹⁷⁷ Michael Lazarus and Harro van Asselt, ‘Fossil Fuel Supply and Climate Policy: Exploring the Road Less Taken’ (2018) 150 *Climatic Change* 1.

¹⁷⁸ Peter Newell and Andrew Simms, ‘Towards a Fossil Fuel Non-Proliferation Treaty’ (2020) 20:8 *Climate Policy* 1043; Harro van Asselt and Peter Newell, ‘Pathways to an International Agreement to Leave Fossil Fuels in the Ground’ (2022) 22:4 *Global Environmental Politics* 28.

¹⁷⁹ UNFCCC, ‘Glasgow Climate Pact’, Decision 1/CP.26, para 20.

¹⁸⁰ United Nations, ‘Secretary-General Calls on States to Tackle Climate Change “Time Bomb” Through New Solidarity Pact, Acceleration Agenda, at Launch of Intergovernmental Panel Report’, SG/SM/21730 (20 March 2023).

¹⁸¹ See the discussion in Harro van Asselt, ‘Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of “Leaving it in the Ground”’ (2021) 9 *Earth System Science* 100118.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ General Assembly, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change – Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation’, A/77/226 (26 July 2022), para 90(e).

fundamental human rights of everyone around the world'.¹⁸⁵ In 2019 the Special Rapporteur on human rights and the environment argued that 'emissions from fossil fuels need to be reduced, beginning immediately' and called on countries, especially developed countries to take actions including '[r]ejecting any other expansion of fossil fuel infrastructure' and '[p]rohibiting the expansion of the most polluting and environmentally destructive types of fossil fuel extraction'.¹⁸⁶ In 2016, his predecessor wrote that '[k]eeping the increase in global temperature to well below 2°C requires States to move rapidly and steadily towards a world economy that no longer obtains energy from fossil fuels'.¹⁸⁷

The Committee on Economic, Social and Cultural Rights has also recommended to states that they should stop some proposed oil and gas developments, because such plans would be 'counter to the State party's commitments under the Paris Agreement and would have a negative impact on global warming and on the enjoyment of economic and social rights by the world's population and future generations'.¹⁸⁸ Within climate litigation there arguably remains a 'supply-side accountability gap' within rights-based climate litigation, however, this may be changing.¹⁸⁹ In the 2022 Australian case, *Waratah Coal Pty Ltd v Youth Verdict Ltd* the Queensland Land Court recommended refusing an environmental authority and mining lease applications for the project, in part because the mine's contribution to climate change would undermine human rights.¹⁹⁰

While no new fossil fuel projects or expansions can be approved if the international community is to limit dangerous anthropocentric climate change to a level that would still allow for the realization of human rights, human rights considerations need to inform how such a ban is imposed and how a phase out of existing fossil fuels production is conducted. Business and human rights scholars have been worried about the potential negative impacts on human rights and development if 'all fossil fuel projects and investments therein [are] dropped at once'.¹⁹¹ However, it is crucial to appreciate that prohibiting any *new* fossil fuel projects or project extensions would still enable fossil fuels production from *existing* mines, fields and wells for immediate energy needs. A prohibition on new fossil fuel projects or project extensions would, however, prevent further investments in assets that will be stranded within their lifetime, and hopefully, thereby drive investment into other renewable energy alternatives.

Moreover, the transformation of the fossil fuel economy needs to be done in a way that does not perpetuate asymmetries between richer and poorer countries.¹⁹² Human rights-based international solidarity demands states – and arguably also corporations – with large historical and ongoing emissions, take the lead in phasing out fossil fuels.¹⁹³ It is also crucial that equity considerations inform the process of stranding assets, including whose fossil fuels are left in the ground, who has the best case for using the remaining allowable amounts

¹⁸⁵ Human Rights Council, 'International Solidarity and Climate Change: Report of the Independent Expert on Human Rights and International Solidarity', A/HRC/44/44 (1 April 2020), paras 29 and 30.

¹⁸⁶ General Assembly, 'Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', note 11, paras 76 and 78.

¹⁸⁷ Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', A/HRC/31/52 (1 February 2016), para 78.

¹⁸⁸ General Assembly, 'Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', note 11, para 67.

¹⁸⁹ Michelle Jonker-Argueta, 'Closing the Supply-Side Accountability Gap Through Climate Litigation', in Rodríguez-Garavito (ed), note 67, 319.

¹⁹⁰ [2002] QLC 21. See also Justine Bell-James and Briana Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43:1 *University of New South Wales Law Journal* 3.

¹⁹¹ Macchi and Bernaz, note 29, 11.

¹⁹² Human Rights Council, 'International Solidarity and Climate Change', note 185.

¹⁹³ *ibid.*

of fossil fuels and should compensation be paid to countries to leave fossil fuels in the ground.¹⁹⁴ A just, rights-based transformation away from fossil fuel dependency also requires accompanying investment in solar, wind and thermal power as well as improvements in energy productivity to ensure affordable and clean energy for all, especially those living in poverty and including the approximately 789 million people who still lack access to electricity.¹⁹⁵

The setting of a clear ‘red line’ that no new fossil fuel projects or project extensions can be permitted, thus provides a clear normative statement that this type of business activity is fundamentally incompatible with the realization of human rights.¹⁹⁶ This proposal can also address each of the critiques of climate due diligence developed in Section III. First, it can address critiques about the inadequacy of climate due diligence to fully promote corporate climate accountability, by adding an additional, complementary measure to the ‘wider regulatory menu’.¹⁹⁷

Second, it can address critiques about the conceptual ambiguity of climate due diligence, by providing a vision of a just and rights-based transition away from fossil fuel dependency and towards a low-carbon society against which the credibility of corporate transition plans and climate due diligence processes can be assessed. Such a prohibition can also provide a clear standard to guide interpretations of whether a business or business activity is ‘contributing’ to climate change, and whether its targets or transition plan are credible. As a standard for guiding the interpretation of climate due diligence it broadly aligns with Macchi and Bernaz’ argument that new projects or project expansions that are ‘bound to give rise to significant amounts’ of GHG emissions, ‘potentially contribute to climate change within the meanings of the UNGPs’.¹⁹⁸ It also aligns with the findings of the UN High-Level Expert Group that ‘net zero’ claims by business are not credible if the business is also supporting new investment in fossil fuel supply.¹⁹⁹

The setting of clear regulatory ‘red lines’ could also provide a clear standard to guide the assessment of whether the operations, products or services of a business is directly or indirectly ‘linked to’ climate-related human rights impacts through their business relationships. Indeed, a number of advocacy campaigns for climate corporate accountability has already adopted this standard, calling on financial institutions, public relations and law firms that are enabling the continued investment in fossil fuels to sever these business relationships.²⁰⁰

Third, a regulatory ‘red line’ can address the more fundamental operational and structural limits to climate due diligence. By positing a prohibition on new fossil fuel developments, it makes clear that there is no ‘social licence’ for certain products (namely, fossil fuels) and by implication, that the irresponsible business practice of the fossil fuel industry are not socially acceptable. Such a ban would also fundamentally challenge the disproportionate economic and political power that has been wielded by the fossil fuel industry for decades and which has been used to undermine climate action. However, implementing such regulatory ‘red lines’ faces considerable obstacles, especially given the

¹⁹⁴ Simon Carney, *Climate Change, Equity and Stranded Assets* (Oxfam America, 2016).

¹⁹⁵ General Assembly, ‘Transforming our World: The 2030 Agenda for Sustainable Development’, A/RES/70/1 (21 October 2015), Goal 7.

¹⁹⁶ On the value of ‘anti-fossil fuel norms’, see Fergus Green, ‘Anti-Fossil Fuel Norms’ (2018) 150 *Climatic Change* 103.

¹⁹⁷ Deva, note 1, 414.

¹⁹⁸ Macchi and Bernaz, note 29, 11.

¹⁹⁹ High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, note 101.

²⁰⁰ Alison Kirsch et al, *Banking on Climate Chaos: Fossil Fuel Finance Report 2022* (Rainforest Action Network (RAN), BankTrack, Indigenous Environmental Network (IEN), Oil Change International (OCI), Reclaim Finance, Sierra Club, and Urgewald, 2023); ‘Clean Creatives’, <https://cleancreatives.org/> (accessed 30 April 2023); ‘Law Students for Climate Accountability’ <https://www.ls4ca.org/law-students> (accessed 29 April 2023).

fossil fuel industry's lobbying efforts. Thus, such a regulatory probation needs to be accompanied by measures to address the 'corporate capture' of regulatory institutions by the fossil fuel industry.

Addressing Corporate Capture of Regulatory Institutions

One of the key barriers to effective regulatory response to prevent and mitigate business' climate-related human rights impacts is the 'corporate capture' of international and domestic regulatory bodies by the fossil fuel industry. The Special Rapporteur on human rights in the context of climate change in his 2022 report highlighted the 'serious disconnect between those that continue to support the fossil fuel economy and those that are most affected by the impacts of climate change' and that this 'participation disconnect' limits action to address climate change.²⁰¹ He expressed concern about 'corporate capture' and how 'business elites with interests in the fossil fuel and carbon intensive industries have disproportionate access to decision-makers'.²⁰² Moreover, he argues that '[t]hese fossil industry elites and the politicians they sponsor have a human rights responsibility and need to be held accountable for the human rights abuses they are underwriting'.²⁰³ This analysis echoed earlier recommendations by the Special Rapporteur on human rights and the environment that states should '[l]imit fossil fuel businesses and their industry associations from influencing climate, energy and environmental policies, in light of their responsibility for the majority of emissions and their well-known efforts to subvert and deny scientific evidence of climate change'.²⁰⁴

There are clear precedents for such an approach. For example, the World Health Organization's 2003 Framework Convention on Tobacco Control, includes provisions that limits the involvement of tobacco companies in health policy.²⁰⁵ The UN Workshop Group on Business and Human Rights has shown how human rights harms can result from irresponsible corporate political engagement and articulated best practices to ensure that corporate political engagement is aligned with the UNGPs.²⁰⁶ Concerns about corporate lobbying and corporate influence over regulatory process has also been included in the current draft text of the proposed business and human rights treaty.²⁰⁷ The 2023 update of the OECD Guidelines for Multinational Enterprises and their Implementation Procedures includes a new provision that enterprises should 'ensure transparency and integrity in lobbying activities'.²⁰⁸ Advocacy groups have highlighted these lobbying provisions are 'particularly important in relation climate change-related lobbying' given that '[n]on-science-based or misleading lobbying efforts that do not align with the goals of the Paris

²⁰¹ General Assembly, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', *note 184*, para 74.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ General Assembly, 'Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', *note 11*, para 77.

²⁰⁵ World Health Organization, 'WHO Framework Convention on Tobacco Control' (2003), preamble and art 5.3.

²⁰⁶ Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Corporate Influence in the Political and Regulatory Sphere: Ensuring Business Practice in Line with the Guiding Principles in Business and Human Rights', A/77/201 (20 July 2022).

²⁰⁷ Human Rights Council, 'Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', A/HRC/52/41/Add.1 (23 January 2023), para bis 6.8.

²⁰⁸ OECD 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (2023), chapter 2: General Principles, para 5.

Agreement have been recognized by the UN Intergovernmental Panel on Climate Change as a serious barrier to achieving climate goals'.²⁰⁹

V. Beyond Climate Due Diligence: Remediation and Reparations

This final section discusses what measures are necessary to ensure effective access to a remedy for the existing and potential future climate-related human rights impacts that businesses have caused or contributed to. Pillar III of the UNGPs provides that when businesses have caused or contributed to adverse human rights impacts, they should provide for or cooperate to ensure a remedy.²¹⁰ However, the four-step HRDD process does not include remediation and thus Deva argues that mandatory HRDD 'should contain adequate provisions to enable access to effective remedy if covered business did not conduct HRDD, did it improperly, or human rights abuses occurred despite HRDD'.²¹¹

There are growing legal efforts to hold fossil fuel corporations for their 'failure to address the risk of anthropogenetic climate change despite early and repeated notice of climate risks, and numerous opportunities to avoid or reduce these risks' through climate litigation.²¹² Some climate litigation cases have relied upon tort law, or the law of non-contractual responsibility in civil jurisdictions as well as international human rights law.²¹³ There are also climate litigation efforts to hold corporations to account for misinformation and deceptive conduct through consumer protection laws.²¹⁴ There are also suggestions that fossil fuel companies could be held accountable through criminal law for homicide.²¹⁵ Such calls for criminal liability echo broader calls for development of the international crime of ecocide and its prosecution by the International Criminal Court.²¹⁶ The two sub-sections below discuss reparations and remedy measures necessary to redress two different types of harms: (i) the misleading and deceptive conduct of fossil fuel companies and (ii) the loss and damage related to the adverse impacts of climate change.

Accountability for Misleading and Deceptive Conduct

The long history of the fossil fuel industry's well-funded, carefully orchestrated campaigns of misinformation and public deception has been well-documented.²¹⁷ Both the European Parliament and the US Congress have held hearings to investigate the deception by fossil fuel companies.²¹⁸ There are a number of pending lawsuits brought by US state and

²⁰⁹ OECD Watch, 'Input to the January/February 2023 public consultation on the consultation draft of targeted updates to the OECD Guidelines for Multinational Enterprises' (10 February 2023).

²¹⁰ UNGPs, note 26, Principle 22.

²¹¹ Deva, note 1, 406.

²¹² Frumhoff, Heede and Oreskes, note 20, 1.

²¹³ Ekwurzel et al, note 18.

²¹⁴ Jessica Wentz and Benjamin Franta, 'Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages' (2022) 52 *Environmental Law Reporter* 10995.

²¹⁵ David Arkush and Donald Braman, 'Climate Homicide: Prosecuting Big Oil for Climate Deaths' (2024) 48:1 *Harvard Environmental Law Review* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335779 (accessed 28 April 2023).

²¹⁶ Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* (Stop Ecocide Foundation, 2021). See also General Assembly, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', note 184, para 90(f).

²¹⁷ See discussion in section III, 'Structural Limitations of Climate Due Diligence'.

²¹⁸ Valerie Volcovici and Timothy Gardner, 'U.S. House Democrats to Subpoena Big Oil in Climate Deception Probe', *Reuters* (28 October 2021), <https://www.reuters.com/business/cop/us-congress-puts-big-oil-hot-seat-climate-deception-probe-2021-10-28/> (accessed 28 April 2023); Adam Vaughan, 'MEPs to Scrutinize ExxonMobil's Alleged Role in Climate Change Misinformation', *The Guardian* (17 December 2018), <https://www.theguardian.com/>

municipalities against fossil fuel companies alleging companies knew about the dangers posed by their products, intentionally concealed these dangers and sought to create doubt about climate science and undermines public support for climate action.²¹⁹ In late 2022, 16 municipalities in Puerto Rico filed a lawsuit against a number of fossil fuel companies, including ExxonMobil, Shell and Chevron, under US racketeering and antitrust laws, alleging a ‘fraudulent marketing scheme’ to convince consumers that fossil fuels did not cause climate change.²²⁰ While many of these lawsuits are still in early stages, it is likely there will be similar claims in other jurisdictions in the future. Accountability for these targeted misinformation and lobbying campaign is an essential element of corporate climate accountability.

Accountability for Loss and Damage from the Adverse Impacts of Climate Change

The future-orientated focus of climate due diligence to address actual or potential climate-related human rights impacts does not properly address the responsibility for harms arising from the unreasonable historical GHG emissions. These historical emissions have caused serious harms, appropriated atmospheric space and were constitutive in enabling the conditions for the contemporary, unjust, and unequal international legal order.²²¹ Because these historical emissions have ongoing ecological, political and social effects, they impose continuing demands for reparations.²²² Unsurprisingly, this question about the responsibility for historical GHG emission is one of the most fraught issues in international climate politics. Within the UNFCCC negotiations, the problem of ‘loss and damage’ from the adverse impacts of climate change was for over a decade persistently resisted, evaded and avoided.²²³ Even after institutional mechanisms were established, the question of finance remained sidelined.²²⁴ At COP27 in 2022, the international community established a fund to finance loss and climate related loss and damage in especially vulnerable developing countries; however, the international regime does not establish any corresponding obligation on those most responsible for historical emissions to contribute to the fund.²²⁵ The Transitional Committee on the operationalization of the fund was tasked with making recommendations for adoption of the fund at COP28 in 2023, but due to ongoing political contestation between developed and developing countries, there was by June 2023 no ‘clear direction or consensus on what the fund should look like’.²²⁶ In 2023, the General Assembly requested an Advisory Opinion from the International Court of Justice to clarify the

[business/2018/dec/17/meps-to-scrutinise-exxonmobil-alleged-role-in-climate-change-misinformation](https://www.reuters.com/business/2018/dec/17/meps-to-scrutinise-exxonmobil-alleged-role-in-climate-change-misinformation) (accessed 28 April 2023).

²¹⁹ Wentz and Franta, note 214.

²²⁰ Clark Mindock, ‘Puerto Rican Towns Sue Big Oil Under RICO Alleging Collusion and Climate Denial’, *Reuters* (29 November 2022), <https://www.reuters.com/legal/litigation/puerto-rican-towns-sue-big-oil-under-rico-alleging-collusion-climate-denial-2022-11-29/> (accessed 29 April 2023).

²²¹ Sarah Riley-Case and Julia Dehm, ‘Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present’, in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge: Cambridge University Press, 2021) 170.

²²² *Ibid.*

²²³ For an overview of this history, see Julia Dehm, ‘Climate Change, “Slow Violence” and the Indefinite Deferral of Responsibility for “Loss and Damage”’ (2020) 29:2 *Griffith Law Review* 220.

²²⁴ *Ibid.*

²²⁵ UNFCCC, ‘Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage’, Decision -/CP.27 -/CMA.4.

²²⁶ William Worley, ‘Conflict Brews as COP Envoy says Climate Fund Needs Grants, not Loans’, *Devex* (8 June 2023), <https://www.devex.com/news/conflict-brews-as-cop-envoy-says-climate-fund-needs-grants-not-loans-105681> (accessed 16 June 2023).

international legal obligations relating to climate change, including legal consequences for States where they, by their acts and omissions, have caused significant harm to the climate system.²²⁷

While the above developments have primarily focused on the responsibilities of states, there is a strong moral case that fossil fuel companies should provide compensation or reparations for already existing and potential future climate-related human rights impacts. One study has quantified that based on cumulative emissions between 1988 and 2022, the 21 largest fossil fuel companies owe USD5.4 trillion in reparations between 2025 and 2050, or USD209 billion annually.²²⁸ The super-profits made by the fossil fuel industry between 2000 and 2019 could cover the costs of climate-induced economic losses in 55 of the most climate-vulnerable countries nearly 60 times over.²²⁹ There have also been various calls for the establishment of the new institutional mechanisms or reform of existing mechanisms to hold the fossil fuel industry to account. For example, in his 2022 report the Special Rapporteur on human rights in the context of climate change called for the establishment of 'an international human rights tribunal to hold accountable Governments, business and financial institutions for their ongoing investments in fossil fuels and carbon intensive industries and the related human rights effects that such investments invoke'.²³⁰ The Special Rapporteur on human rights in the context of climate change has highlighted the need to establish a 'loss and damage finance facility' and for it to be based on the 'polluter pays principle'.²³¹ In a recent report to the General Assembly, the Special Rapporteur on contemporary forms of racism urged to '[p]rioritize reparations for historical environmental and climate harms and for contemporary harms rooted in historic injustice'.²³² While the UNGPs focused on current and preventing future climate impacts cannot properly address the complex questions of reparative justice that historical emission raise, a more expansive vision of corporate climate accountability has to demand also remedy and reparations for the ongoing human rights harms resulting from historical corporate GHG emissions.

VI. Conclusion

The growing consolidation of the concept of climate due diligence has been a welcome development in the field of business and human rights. Although climate due diligence can play an important role in promoting corporate climate accountability, this article has highlighted four limitations of this concept including the insufficiency, conceptual ambiguity of the concept and its operational and structural limitations. These four critiques operate on quite different registers and initially appear to call for quite different policy responses: the first two could be addressed through more reformist proposals, while the latter two demand more radical, structural change. This article has shown that each of these four critiques could be addressed by the same policy solution,

²²⁷ General Assembly Resolution 77/276, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect to Climate Change', A/RES/77/276 (4 April 2023).

²²⁸ Marco Grasso and Richard Heede, 'Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages' (2023) 6 *One Earth* 459.

²²⁹ Loss and Damage Coalition, *The Cost of Delay: Why Finance to Address Loss and Damage Must be Agreed to at COP27* (2022).

²³⁰ General Assembly, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', note 184, para 90(d).

²³¹ *Ibid.*, para 92(a) and (e)(ii).

²³² General Assembly, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tandayi Achiume – Ecological Crisis, Climate Justice and Racial Justice', A/77/549 (25 October 2022), para 78.

namely, the articulation of clear regulatory ‘red lines’ that prohibit new fossil fuel projects or project extensions and measures to prevent the ‘corporate capture’ of regulatory bodies by the fossil fuel industry. The article also suggested that a more expansive vision of corporate climate accountability demand further measures to provide a remedy and reparations for the historical actions of fossil fuel company, both their deceptive and misleading conduct and for the ongoing harms caused by historical GHG emissions.

When climate change first became a policy concern in the mid-1970s, proposals were being debated to regulate corporations as part of demands for a New International Economic Order.²³³ However, these discussions floundered on the questions of whether such a treaty should address both the duties and rights of corporations. Since then, we have seen the rise of an elaborate network of bilateral and multilateral investment treaties allowing corporations to sue governments to protect their interests, alongside a voluntary framework that calls on corporations to respect human rights.²³⁴ The polycentric governance framework that underpins the UNGPs reflects a broader neoliberal governance approach focused on asking entities to account for their behaviour, rather than actually impose legally binding obligations to ensure certain outcomes. In the face of the enormous policy challenges that the climate crisis confronts us with, this article urges business and human rights practitioners, advocates and scholars to not be content with applying constrained regulatory tools to this ‘super-wicked problem’, but rather to use the imperative to pursue bold and ambitious action to address the climate crisis and to re-envision the possibilities for corporate human rights accountability. The contemporary conjuncture does not call for gradualism reform. Yet in the face of the climate crisis the response by many human rights bodies has been ‘patently inadequate’ and ‘premised on forms of incremental managerialism and proceduralism that are entirely disproportionate to the urgency and magnitude of the threat’.²³⁵ The ‘red lines’ proposed in this article seek to go beyond procedural questions to more systemically confront the root causes of climate change. Adopting these measures could not only provide for clearer standards and expectations regarding human rights obligations of business enterprises in the context of climate change but radically reconceptualize standards for corporate accountability as well as human rights obligations in the context of the climate crisis.

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²³³ Vanessa Ogle, ‘States Rights Against Private Capital: The “New International Economic Order” and the Struggle over Aid, Trade, and Foreign Investment, 1962–1981’ (2014) *Humanity: A Journal of Human Rights, Humanitarianism and Development* 211; Karl P Sauvant, ‘The Negotiations of the United Nations Code of Conduct on Transnational Corporations’ (2015) 16 *Journal of World Investment & Trade* 11.

²³⁴ Sundhya Pahuja and Anna Saunders, ‘Rival Worlds and the Place of the Corporations in International Law’, in Jochen von Bernstoff and Philipp Dann (eds), *The Battle for International Law: South–North Perspectives on the Decolonization Era* (Oxford: Oxford University Press, 2019).

²³⁵ Human Rights Council, ‘Climate Change and Poverty: Report of the UN Special Rapporteur on Extreme Poverty and Human Rights’, A/HRC/41/39 (17 July 2019), para 88.