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Climate change as a business and human rights issue

– A proposal for a moral typology

Kristian Høyer Toft

Abstract

To explore the emerging and contested issue of business and human rights in the area of climate change, this article provides a critical discussion from the view-point of moral philosophy. A novel typology of businesses' human rights duties ('duty' is considered synonymous with 'responsibility' here) is proposed. It claims that duties are both forward- and backward-looking. Cases of human rights litigation seeking remedy for climate-related harms are backward-looking, and duties should be determined on the basis of proportion of historical emissions, culpable knowledge and counter-acts to abate climate harms. Businesses' forward-looking duties, however, depend on their power, privilege, interest and collective abilities. The typology is then assessed against the background of recent legal principles and instruments.

It is concluded that moral duties of business reach beyond mere respect for human rights and national jurisdictions in the context of climate change.

Keywords: climate justice, corporate duties, corporate citizenship, historical responsibility

1. INTRODUCTION: HUMAN RIGHTS AND BUSINESS IN THE AGE OF CLIMATE CHANGE

The idea of holding corporations responsible for violating human rights based on their contribution to climate change is still contested, even though the United Nations Office of the High Commissioner for Human Rights (OHCHR) has stated that ‘businesses are also duty-bearers. They must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights’.¹

Framing the issue of corporate responsibility for climate change in terms of human rights enhances claims to justice in two respects. First of all, such framing takes advantage of the institutional power inherent in the human rights regime, which has already made it clear that climate change is a human rights issue.² Thus, the political force of the United Nations (UN) is a lever for expanding human rights claims to the sphere of corporations. This is a political and pragmatic argument. Second, human rights are also moral rights, as this article will argue. Since corporations³ are already deeply involved in climate change, and climate change is a serious and salient issue that impacts on human rights, it seems obvious that some level of human rights responsibility should also be carried by corporations. The contribution of this article is to help clarify what those responsibilities are and thus also to supplement and challenge the legal approaches with moral considerations.

¹ Office of the High Commissioner for Human Rights (OHCHR) ‘Understanding climate change’, Submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change’ 2015, 4, <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (accessed 22 September 2019).

Note that businesses are here considered ‘duty-bearers’, and therefore not merely ascribed ‘responsibility’ to respect human rights as otherwise recommended in the United Nations’ ‘Guiding Principles (UNGPs) on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’. A/HRC/17/31 (31 March 2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 22 September 2019).

The terms ‘duties’ and ‘responsibilities’ are used interchangeably in this article, following the use of Henry Shue, ‘Responsible for What? Carbon Producer CO₂ Contributions and the Energy Transition’ (2017) 144(4) *Climatic Change*, and Florian Wettstein, ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 14:2 *Journal of Human Rights*.

Furthermore, the corporate moral duties considered regard both backward-looking acts and omissions that could render a business culpable and liable, but also forward-looking duties to seek knowledge about business impacts on human rights in the context of climate change, for instance, by conducting proper due diligence. Such corporate duties, however, are not constrained to mere instrumental risk management or legal criminal culpability, since they are also moral duties.

² UN resolutions explicitly address human rights as a climate change issue (7/23 in 2008; 10/4 in 2009; 18/22 in 2011; 26/27 in 2014; 29/15 in 2015; 38/4 in 2018), epitomized in the Preamble of the Paris Agreement: ‘Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights’, 4. United Nations *The Paris Agreement*. (UNFCCC 2015): https://unfccc.int/sites/default/files/english_paris_agreement.pdf (accessed 22 September 2019)

³ The terms corporation, business and enterprise are used synonymously.

A main reason for the contestation of human rights claims pertains to the number of difficult and unsettled issues relating to the interlinkages between climate change, business and human rights. These are issues about what constitutes a human right in the context of climate change, and what constitutes business and human rights (BHR) responsibilities in a state-centric regime. These are questions that need to be clarified even before it is possible to outline answers to BHR responsibilities vis-à-vis the climate-vulnerable individuals who hold the rights. In view of the daunting challenge this poses to any approach, the aim is here to outline a novel typology⁴ which provides an overview of the key human rights duties and responsibilities that corporations face when regarded as complicit in the context of climate change. The typology is particularly crafted to address corporate responsibilities for and in the context of human rights and climate change. Since the typology is based on inspiration from various sources, mainly in moral philosophy, it overlaps with other approaches. For instance, the typology overlaps with the United Nations Guiding Principles (UNGP) with regard to arguing for extensive forward-looking responsibilities. However, the typology goes further than the UNGP in claiming that it is not enough to merely respect human rights. Climate change also creates duties to protect and remedy based on the need for mitigation, adaptation and compensation for loss and damage. Hence, the typology aims at being sensitive to the particular obligations relevant to abating climate change, and therefore the typology presents a more comprehensive framework than the UNGP. However, it can be conceded that the typology might also be usefully applied to issues other than climate change. For instance, the typology could have implications for assessments of business and human rights responsibilities in areas such as supply chains, biodiversity, gender cultures, data ethics and structural discrimination. As long as corporations have been involved in historic wrongs and remain part of a system, they may accrue both backward- as well as forward-looking duties. However, in this article the typology is developed and discussed with particular sensitivity to corporate duties of human rights in the context of climate change.

⁴ See 'Figure 1'. With the exception of closely related research in legal theory (Sara L. Seck, 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty' (2017) 26 *Transnational Law & Contemporary Problems*; T. Bach, 'Human Rights in a Climate Changed World: The Impact of COP21, Nationally Determined Contributions, and National Courts'. (2016) 40 *Vermont Law Review*), the research in business ethics and human rights (Wettstein note 1; Michael A. Santoro, 'Business and Human Rights in Historical Perspective' (2015) 14:2 *Journal of Human Rights*; Nien-he Hsieh, 'Should Business Have Human Rights Obligations?' (2015) 14:2 *Journal of Human Rights*) has not yet addressed the issue of climate change. The research on business ethics and corporate social responsibility with regard to climate change is currently developing (Christopher Wright and Daniel Nyberg, *Climate Change, Capitalism, and Corporations*. (Cambridge: Cambridge University Press, 2015); Dennis G. Arnold, 'Corporate Responsibility, Democracy, and Climate Change' (2016) 40(1) *Midwest studies in philosophy*; Säde S. Hormio, 'Can Corporations Have (Moral) Responsibility Regarding Climate Change Mitigation?' (2017) 20:3 *Ethics, Policy & Environment*; Marco Grasso & Katia Vladimirova, 'A Moral Analysis of Carbon Majors' Role in Climate Change' (forthcoming) *Environmental Values*), but it does not address the topic of human rights directly.

The argument supporting the general claim for corporate human rights duties owed to the victims of climate change is simple enough, and ‘depends upon whether a victim can substantiate a claim that a duty bearer has contributed to climate change, in such a way as to amount to a human rights violation’.⁵ The argument is, therefore:

- a. Climate change exerts negative impacts on human rights.
- b. Both state and non-state actors, e.g. corporations, have caused climate change.
- c. Those who have caused climate change, and continue to do so, are responsible for negative impacts on human rights.

Conclusion: Therefore, not only state actors, but also corporations, are responsible for the negative impacts on human rights in the context of climate change.

The argument’s simplicity disguises the fact that the meaning of this conclusion is contested among legal scholars.⁶ Disputes about these premises – because human rights are inherently conceived of as being state centric⁷ – tend to undermine the truth value of the conclusion.

⁵ Annalisa Savaresi & Jacques Hartmann, ‘The Impacts of Climate Change and Human Rights: Some Early Reflections on the Carbon Majors Inquiry’ (November 2, 2018). Available at SSRN: <https://ssrn.com/abstract=3277568> or <http://dx.doi.org/10.2139/ssrn.3277568> (accessed 22 September 2019), 1. The assumption of a symmetrical relationship between rights holders and duty bearers is reflected in the UN High Commissioner of Human Rights’ outlining the ‘rights-based approach to climate change’ as follows: ‘The *rights-holders* and their entitlements must be identified as well as the corresponding *duty-bearers* and their obligations in order to find ways to strengthen the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations’ (UN Office of the High Commissioner for Human Rights (OHCHR 2017), ‘Climate change – overview’, <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (accessed 22 September 2019)).

If human rights claims are meant only to be aspirational, and therefore do not require symmetry between human rights holders and duty bearers, it becomes less difficult to defend the claim to human rights protections in the case of climate change. This is so, because the causal relationship between emitters and climate victims is difficult to trace. However, this is challenged by Richard Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers’, (2014) 122(1-2) *Climatic Change* in the case of the carbon majors, discussed in 2.1.

⁶ Especially, what human rights responsibilities can be ascribed to non-state actors such as corporations. See Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises*. (The Hague: Eleven International Publishing, 2018); Sara L. Seck, ‘Business Responsibilities for Human Rights and Climate Change - A Contribution to the Work of the Study Group on Business and Human Rights of the International Law Association’ (Draft version May 25, 2017). Available at: <https://ssrn.com/abstract=2974768> (accessed 22 September 2019); Jan Van de Venis and Birgitte Feiring, *Climate Change – A Human Rights Concern*. The Danish Institute for Human Rights, (2016) https://www.humanrights.dk/sites/humanrights.dk/files/media/billeder/nyheder/final_dihr_hr_and_cc_paper_3_11_16.pdf (accessed 22 September 2019);

International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*. London (2014), <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> (accessed 22 September 2019).

⁷ Hsieh, note 4.

However, in this article, the conclusion that corporations have certain human rights responsibilities in the realm of climate change is defended through the exploration and explanation of the proposed typology (see ‘Figure 1’). It is argued that corporations have backward-looking human rights duties to remedy harms from climate change to which they have contributed, but also forward-looking responsibilities to prevent negative impacts on human rights from climate change. The carbon majors’ case⁸ is discussed to provide substance to the historical argument for backward-looking corporate responsibility. The carbon majors’ example is seminal, in the sense that it provides a test-case for whether and how human rights can be applied to the realm of business and climate change. If such an argument fails, the prospects for ascribing human rights responsibilities to corporations with regard to climate change is considerably weakened.

The typology is based on two moral frameworks: Henry Shue’s moral account of the carbon majors’ backward-looking duties to rectify their historic omissions in combination with Iris Marion Young’s theory of forward-looking shared responsibility.⁹ Even when a corporate agent is not liable for past harms, it might still carry some forward-looking duties due to its capacity for counteracting future harms from climate change. Thus, the question about delineating forward-looking duties is more difficult to settle, since, according to Young, such duties and responsibilities may fall upon corporate agents depending on circumstances due to power, privilege, interests, and collective ability.¹⁰ And, therefore, many corporations could potentially carry far-reaching human rights responsibilities, according to the forward-looking responsibility envisaged by Young and others.¹¹

⁸ Heede, note 5; Greenpeace Southeast Asia, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, (2015) https://www.greenpeace.org/seasia/ph/PageFiles/735291/CC%20HR%20Petition_public%20version.pdf (accessed 22 September 2019); Peter C. Frumhoff, Richard Heede & Naomi Oreskes, ‘The climate responsibilities of industrial carbon producers’ (2015) 132(2) *Climatic Change*; Savaresi & Hartmann, note 5. The carbon majors’ case is also referred to in the recent Human Rights Council (the Alston Report), *Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights*, 2019. A/HRC/41/39. The report is critiqued for overlooking available legal tools to combat climate change by targeting non-state actors like the carbon majors. See Sara Seck, Meinhard Doelle and Lisa Benjamin, ‘The Climate Emergency and Human Rights: Reflections on the Report of the Special Rapporteur on Extreme Poverty’, *Environmental Law News* (23 July 2019), <https://blogs.dal.ca/melaw/2019/07/23/the-climate-emergency-and-human-rights-reflections-on-the-report-of-the-special-rapporteur-on-extreme-poverty/> (accessed 22 September 2019).

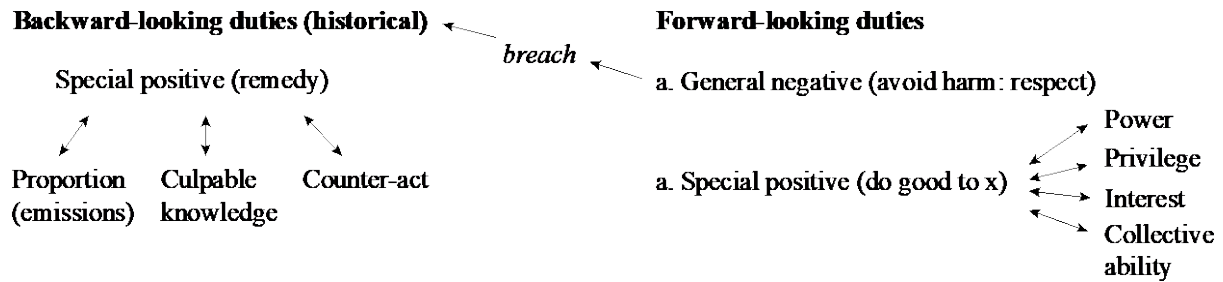
⁹ Shue, note 1; Iris Marion Young, *Responsibility for Justice*, (Oxford: Oxford University Press, 2011).

¹⁰ I thank a reviewer for raising the relevant question about whether or not the typology would demand a duty to seek knowledge about business impacts on human rights in the context of climate change, e.g. through a due diligence process. I agree that such a duty is important, and thus the typology suggested here builds on the general assumption that it is always a corporate moral responsibility to seek such knowledge and be transparent to the public about it in reporting and communication.

¹¹ The UN Special Representative for Business and Human Rights (2005-2011), John Ruggie, is explicit about an inspiration from Young’s notion of shared responsibility in his understanding of complicity and sphere of influence (John G. Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101(4) *American Journal of*

This reasoning is translated into ‘Figure 1’ of the temporally conditioned corporate duties.

Figure 1. *Business and human rights typology of climate change*



The article is structured according to the typology, so that each section explains specific corporate duties and responsibilities relevant to the temporal aspect and the moral features of the situation.

First, an introduction to the approach taken – a moral, as opposed to legal, one – follows. It aims at answering some fundamental, and moral, questions about human rights, but now in the context of climate change.

Second, the carbon majors’ case is presented to show the significance of corporate agents in causing climate change. Also, of particular concern here is the question of the corporate form, as the carbon majors are defined by categories which span the public-private dichotomy. Moreover, the carbon majors’ case raises the question about whether corporate responsibilities are limited to mitigating climate change¹², or whether they should also provide for adaptation, as well as compensation for loss and damage.¹³

International Law). For an overview of applying Young’s notion of responsibility to the business sphere, see Florian Wettstein, ‘Corporate Responsibility in the Collective Age: Toward a Conception of Collaborative Responsibility’ 117(2) (2012) *Business and Society Review*.

¹² Hormio, note 4.

¹³ United Nations (2015). *The Paris Agreement*. Article 8.1 explicitly mentions that ‘Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change’. But parties are states, and there is no explicit mentioning of (financial) compensation for ‘loss and damage’. However, the loss and damage mechanism might provide momentum for considering (financial) compensation also. For an overview see Meinhard Doelle and Sara L. Seck, ‘Loss & Damage from Climate Change: A Maturing Concept in Climate Law?’ (January 10, 2019). Available at SSRN: <https://ssrn.com/abstract=3313416> (accessed 22 September 2019).

Section 3 focuses on the backward-looking duties. The criteria of proportion, culpable knowledge, and counteraction are explored, in order to determine corporates' responsibilities to remedy past harms caused by their historical emissions. The extent to which a corporate agent is responsible for remedying (rectifying) the dire circumstances of the climate vulnerable is determined both for itself and in conjunction with others. In Section 4, the perspective turns to what determines forward-looking corporate human rights responsibilities, measured by the criteria of what powers, privileges, interests, and collective capacities a corporate agent possesses. Section 5 provides an assessment of current documents guiding corporate responsibility in the context of climate change. Finally, the article is concluded in Section 6 with a discussion about the prospects and limits found in the moral typology.

2. PRELIMINARY ELABORATIONS ON HUMAN RIGHTS, CLIMATE CHANGE AND BUSINESS

The approach taken in this article is mainly a *moral* view of human rights, which is a normative approach to business and human rights. In the philosophical literature on business and human rights, the key distinction between moral and institutional (or legal and political) human rights is often taken as given.¹⁴ Nonetheless, the distinction between a purely moral and an equally pure institutional conception of human rights is difficult to uphold, since the debate over businesses' human rights duties and responsibilities is co-created by contributions from legal scholars and the practice in the UN and business communities – the moral view of human rights can be found to be inherent to human rights activists' call for climate justice. However, scholars of business ethics are also participants in the debate. The 'Protect, Respect and Remedy' framework of 2008¹⁵ and the UN Guiding Principles (UNGP) launched in 2011 by John Ruggie, the UN Secretary General's Special Representative for Business and Human Rights, elicited a number of responses from business ethicists, who argued that the constraining of corporate responsibility to respect human rights on the grounds of political

¹⁴ Hsieh, note 4, 219; Anne E. Mayer, 'Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories' (2009) 88(S4) *Journal of Business Ethics*; George G. Brenkert, 'Business Ethics and Human Rights: An Overview' (2016) 1(2) *Business and Human Rights Journal*. A proponent of the 'moral view' of human rights is Amartya Sen: 'Human rights can be seen as primarily ethical demands. They are not principally "legal," "proto-legal" or "ideal-legal" commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights', 319 in Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs*.

¹⁵ UN Secretary General's Special Representative for Business and Human Rights, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, (2008) A/HRC/8/5, http://dag.un.org/bitstream/handle/11176/269890/A_HRC_8_5-EN.pdf?sequence=3&isAllowed=y (accessed 22 September 2019)

pragmatics was not defensible.¹⁶ Hence, the relationship between a moral and an institutional conception is intricate, and involves critical debate which goes in both directions. The point here is that the moral approach needs to be informed by, and reflective of, recent developments in the legal and political realms. Or, as Santoro phrases it: ‘Legal scholars are at the vanguard, pushing the agenda to codify BHR responsibilities. In turn, business ethicists can help shape the substance of emerging legal principles so that they comport with fundamental principles of justice and fairness’.¹⁷

Hence, the moral typology suggested to help determine corporate human rights responsibilities in the context of climate change is not supposed to be a free-standing, ideal theory. Rather, it is presented as contextually sensitive and in dialogue with recent developments in the institutional legal-political context. Therefore, it is not supposed to be a ‘mirroring theory’, or constitutive of a legal theory to precede new soft or hard laws, and, even less, be a natural law-inspired typology that would provide sufficient grounding for a new conception of human rights. Instead, it aims to be neutral about – or set aside – the most commonly-found notion of what constitutes a human right: this being the protection of vital interests, basic rights, freedom, the agency of human persons, dignity, or the ‘saliency’ of an issue. It is taken for granted that climate change poses grand challenges and that its impacts on human rights are occurring on a growing scale. Moreover, the question about which human rights are relevant is also set aside, since it is not the focus of this article to decide what sort of human rights are impacted. This said, it is indisputable that the very basic human rights of life, liberty, and security are at stake, and that these are certainly inseparable from a more expansive list of rights including social, economic, and cultural rights. Ruggie’s recommendation to include all recognized human rights¹⁸ is, therefore, also accepted as being compatible with the proposed moral typology, and as being in accordance with the UN resolutions from 2008 onwards on human rights and climate change, as well as recent theory of climate justice.¹⁹

¹⁶ For instance, Wettstein note 1.

¹⁷ Santoro, note 4, 158. Sheila Watt-Cloutier, in her book *The Right to be Cold – One Woman’s Fight to Protect the Arctic and Save the Planet from Climate Change*, (Minneapolis: University of Minnesota Press, 2015) argues with regard to climate change, that ‘A human rights-based approach takes the path of principle, showing us that fundamental change is not just sound policy but also an *ethical imperative*’ (2015, xxii). This remark is an example of the co-creation between the moral and the institutional (strategic) conceptions. Savaresi & Hartmann note 5, 1, in a similar vein: ‘critically appraise[s] the role of human rights law in solving complex questions associated with responsibility for the impacts of climate change as a gap-filler, until other areas of law can satisfactorily address the adverse impact of climate change’.

¹⁸ UNGP, note 1.

¹⁹ Simon Caney, for instance, argues that ‘persons have the human right not to suffer from the disadvantages generated by global climate change ... drought and crop failure, heatstroke, infectious diseases, flooding, enforced relocation and

This article also does not engage with the dispute over whether or not businesses are qualified to be human rights duty bearers.²⁰ It is assumed that they are, though it is discussed to what extent they are and how this responsibility has backward- and forward-looking features. The moral approach taken here more closely resembles attempts to provide criteria for the human rights responsibilities of corporations such as Santoro's fair share theory, stating the criteria of the relationship, its effectiveness, and its capacity to matter.²¹ However, the proposed typology is crafted with the intent of determining corporate responsibilities with regard to climate change in particular, though it might also be useful in other contexts, like the one Santoro addresses (of a post-Westphalian society, which might be relevant in view of the general tendency towards government-failure of the global climate governance system).

The ambition is to respond to three tasks for the moral philosopher expounded by Brenkert, namely, to provide an account of collective responsibility, remediation, and institutional stability with regard to human rights.²² The issue of collective responsibility and remediation is given an account in the typology's concern for forward- and backward-looking duties. The regard for institutional stability is more difficult and at the edge of what the typology aims to deliver, it being concerned with morality and not primarily with matters of political and legal-institutional feasibility.

2.1 The Carbon Majors' Case and the Philippines' Petition

Recently, in a study by climatologist Richard Heede, it was documented that a two-thirds share of the total contributions to historical global emissions from 1850 to 2010 can be traced to 90 corporations – investor- and government-owned carbon majors in the oil, coal, and gas industries. For instance, Heede shows that the top emitter, Chevron, contributed 3.52% of total historical emissions.²³ This, arguably, attributes some proportion of responsibility for climate change to

rapid, unpredictable and dramatic changes to their natural, social and economic world' ('Cosmopolitan Justice, Responsibility, and Global Climate Change' (2005) 18(04) *Leiden Journal of International Law*, 768).

²⁰ The dispute between Hsieh (note 4), who defends an ideal of status egalitarianism that disqualifies private corporations from being human rights holders, and Dennis G. Arnold, 'On the Division of Moral Labour for Human Rights Between States and Corporations: A Reply to Hsieh' (2017) 2 *Business and Human Rights Journal*, who argues that they are qualified qua moral agents to have human rights obligations (though different from the state's obligations).

²¹ Michael A. Santoro, 'Post-Westphalia and Its Discontents: Business, Globalization, and Human Rights in Political and Moral Perspective' (2010) 20(2) *Business Ethics Quarterly*, 292.

²² Brenkert, note 14, 305.

²³ Heede, note 5, 237; Brenda Ekwrzel et al 'The Rise in Global Atmospheric CO₂, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' (2017) 144(4) *Climatic Change*.

Chevron and the other carbon majors who, therefore, qualify as contributing towards causing climate change.²⁴

Following Heede's research, in 2015, Greenpeace Southeast Asia, thirteen NGOs, and a number of typhoon survivors delivered a petition to the Commission on Human Rights of the Philippines which contained an allegation against 50 carbon majors which stated that:

The Carbon Majors should be held accountable for violations or threats of violations of Filipinos' rights (a) to life; (b) to the highest attainable standard of physical and mental health; (c) to food; (d) to water; (e) to sanitation; (f) to adequate housing; and (g) to self-determination resulting from the adverse impacts of climate change. Special attention should be paid to marginalized and disadvantaged people and communities particularly vulnerable to the effects of climate change, including women, children, persons with disabilities, those living in extreme poverty, indigenous peoples, and displaced persons; as well as the right of Filipinos to development.²⁵

Besides the aforementioned Chevron, the carbon majors include ExxonMobil, Royal Dutch Shell, British Petroleum, and Rio Tinto which have existed for decades – if not centuries. The Petition appeals to the Commission on Human Rights of the Philippines to initiate an investigation of possible human rights violations by the carbon majors.²⁶ But the Petition also demands remedy for the human rights violations and proposes that the way 'to determine the level of responsibility of an individual carbon major is by identifying the company's share in the estimated global industrial emissions of carbon, and when it is supposed to have allegedly acquired knowledge of its product's harmful effects,

²⁴ Frumhoff et al, note 8; CIEL – Center for International Environmental Law *Smoke and Fumes. The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis*. (Washington and Geneva: CIEL, 2017). <https://www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf> (accessed 22 September 2019)

; CDP – Carbon Disclosure Project, *The Carbon Majors Database – CDP Carbon Majors Report* (July 10, 2017): <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions> (accessed 22 September 2019).

²⁵ Greenpeace Southeast Asia, note 8, 5.

²⁶ The Commission on Human Rights of the Philippines has responded to the petition by initiating a National Inquiry of Climate Change. Since the Petition breaks new ground by litigating corporations not domiciled within the Philippines' jurisdiction, the Commission offers a 'forum' for dialogue on climate justice for all affected parties globally. A series of hearings have been arranged in London, Manila and New York. The carbon majors have also been given a chance to respond, but so far they have avoided dialogue. The Commissions' work can be accessed here: <https://essc.org.ph/content/nicc/> (accessed 22 September 2019).

including the impacts on the climate, ecological balance, and people's health, or was informed of those impacts'.²⁷

The Petition focuses on the responsibility of the investor-owned Carbon Major companies", which are 50 companies responsible for a share of '21.72% of estimated global industrial emissions through 2010'.²⁸ In appealing to the UNGP, the Petition claims that a carbon major may accrue responsibility for human rights violations in three dimensions: '(1) it may cause impacts through its own activities; (2) it may contribute to impacts through its own activities, either directly or through some outside entity (government, business, or other); and (3) it may be involved in impacts caused by an entity that is directly linked to its business operations, products, or services'.²⁹ As long as no guidance on the topic of climate change is offered in the UNGP, this interpretation cannot easily be dismissed. Thus, the Petition espouses a clear-cut case for ascribing human rights responsibilities to the carbon majors on the grounds of their neglectful past behavior.

However, there are also problems to be identified in the Petition. Seck, in a research article which reflects on relational law, feminism, and the corporate form with regard to the Philippines' Petition, finds that it overlooks state responsibility and duties as expressed in the UNGP (Principle 1) that states should protect against human rights violations within their jurisdictions.³⁰ The division of moral responsibility between corporations and the state is, therefore, not as clear as the Petition envisages. Furthermore, the exclusive focus on private corporations (investor-owned) in the Petition lacks justification in the research about the carbon majors, where public-owned companies and states have been among the top emitters throughout history. Seck goes further and diagnoses a gender bias in the international law of human rights in the assumption of a sharp divide between the public and the private; in particular, the notion of non-relational autonomy found in liberal law's understanding of state sovereignty and the corporate person, an assumption that the Petition uncritically repeats. Seck, on the basis of this reflection, reaches the conclusion that 'the petitioners should have included both private and public (investor-owned and state-owned) Carbon Majors in the Petition'.³¹

Seck's critical questioning of the liberal assumption of the Petition raises deeper issues relevant to the focus of this article. Does the human rights approach commit to distinctions between the public

²⁷ Greenpeace Southeast Asia, note 8, 30.

²⁸ Ibid 13.

²⁹ Ibid 19.

³⁰ Seck, note 4, 17.

³¹ Ibid 25.

and the private which obscure the entanglements between the state and the corporate realm, rendering understandings of a shared – and genuinely collective – responsibility evasive? In Section 4 below, the issue of shared responsibility in the discussion of Young’s forward-looking model of responsibility is compared with a relational approach. This will show that there might be a trade-off between making corporate agents accountable for causing climate change due to their being ‘agents of justice’ or ‘corporate moral agents’, and deconstructing them into a sphere of relations, rendering it difficult to ascribe any responsibility to them qua being an agent.³²

2.2 Human Rights Litigation and Climate Change

The carbon majors’ case is part of a larger trend in climate litigation.³³ This is an example of ascribing backward-looking duties to corporations. The fact that climate victims have legitimate claims to justice is seen in the wording of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), which mentions that developed industrial states are responsible for the majority of historical emissions. Industrialized states, therefore, have a ‘common but differentiated responsibility’ to compensate the victims of climate change; hence, those who have the ability to pay and the technological means required to alleviate the suffering of climate victims should take on the responsibility. Issues of justice, equity, and compensation are therefore part and parcel of the thinking of the UNFCCC, and thus also in the subsequent climate negotiations and the COP 21’s mentioning of ‘loss and damage’ in Article 8. Consequently, it is not surprising that victims of climate change are seeking compensation for their losses in the spirit of the UNFCCC.³⁴ The Philippines’ Petition is a case in point.

Litigation against states has already shown some success. For instance, in 2015, a Dutch NGO – Urgenda – won a lawsuit against the Dutch state together with 900 citizens, and the court ruling states that the ‘Netherlands has a duty of care and has to step up efforts on greenhouse gas reductions, in

³² In moral theory the possibility of corporate moral agency is a contested issue, for instance in Onora O’Neill, ‘Agents of Justice’ (2001) 32(1-2) *Metaphilosophy*. For a recent overview Eric W. Orts and N. Craig Smith (Eds.), *The Moral Responsibility of Firms* (Oxford: Oxford University Press, 2017).

³³ Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert ‘If at First You Don’t Succeed: Suing Corporations for Climate Change (2018) 38/4 *Oxford Journal of Legal Studies*.

³⁴ According to Savaresi & Hartmann, note 5, 2, the access to remedy based on litigation has not yet (until 2018) succeeded, since ‘no court has found that particular emissions relate causally to adverse climate change impacts for the purpose of establishing liability. Still, recent years have witnessed a surge in litigation, including requests for compensation for harm associated with the impacts of climate change’.

line with international treaty obligations to this effect'.³⁵ More controversial are cases in which business corporations are litigated for human rights violations.³⁶ For instance, in April 2018, the Dutch branch of the international environmental organization Friends of the Earth sent a 'notice letter' to Royal Dutch Shell demanding that, 'Shell accepts legal responsibility to amend its corporate strategy and investment decisions and to align them with the global climate objectives as laid down in the Paris Agreement'.³⁷ Furthermore, the letter mentions that 'Dutch law places Shell under a legal obligation to respect human rights'.³⁸ In 1986, Shell was already aware of its impact on climate change and, according to an internal report, had an awareness that 'it is possible that the environment will be affected to such an extent that some parts of the earth may become uninhabitable'.³⁹ In blaming Shell for this neglect, Friends of the Earth emphasizes human rights: 'By continuing to contribute to climate change, Shell, together with the other major fossil fuel multinationals, bears a special responsibility for (the projected rise in) such human rights violations as a result of imminent climate change.'⁴⁰ Hence, human rights play a significant role as a 'legal arbiter' in the letter to Shell. This tendency is confirmed by the Danish Institute for Human Rights, since 'the emerging attention to cases of human rights violations caused by climate change show a common strategy: the use of international climate change agreements and norms, combined with human rights law and principles of intergenerational equity to hold individual countries and companies accountable.'⁴¹

In the next sections, the moral typology is further presented and discussed, in order to argue for first backward-looking and then forward-looking duties.

3. BACKWARD-LOOKING DUTIES: IN BREACH OF THE DUTY TO AVOID HARM

³⁵ Van der Venis & Feiring, note 6, 16.

³⁶ Judith Schrempf-Stirling & Florian Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies' (2017) 145(3) *Journal of Business Ethics*; Savaresi & Hartmann, note 5, helpfully refer to the litigation database curated by the Sabin Centre at Columbia Law School at <http://climatecasechart.com> (accessed 22 September 2019).

³⁷ Friends of the Earth, 'Notice letter Shell' (2018), 2, <https://en.milieudefensie.nl/news/noticeletter-shell.pdf> (accessed 22 September 2019).

³⁸ Ibid 3.

³⁹ Ibid 5.

⁴⁰ Ibid.

⁴¹ Danish Institute for Human Rights – News 'Climate Change is a Human Rights Concern' (2016, 4th November), <https://www.humanrights.dk/news/climate-change-human-rights-concern> (accessed 22 September 2019).

The most basic responsibility to *do no harm* is a negative, general, and forward-looking responsibility that everyone owes to everybody at all times.⁴² From the date that the carbon majors first became aware of fossil fuels causing climate change – sometime from around the 1960s and during the 1970s and 1980s, or at least later when the UN Intergovernmental Panel on Climate Change (IPCC) issued its first report in 1990 – they have violated their basic responsibility to do no harm. Hence, the carbon majors need to discharge the *backward-looking* duties they have incurred and, according to Henry Shue, ‘assist in dealing with the disruptions for which their products are the source by financing adaptation and participating in compensation for damage and loss in proportion to their knowing contribution to the disruptions’.⁴³ Hence, the criteria of the typology proposed in this article takes its cue from Shue. Not only are the carbon majors responsible *proportionately* to their share of total emissions, but the criterion of *culpable knowledge* also affects their level of responsibility. Furthermore, the levels of *counteraction* and *engagement* to compensate and remedy the harms done are relevant to the ascription of backward-looking responsibility. These are the three criteria relevant to determine corporate backward-looking duties that I glean from Shue’s discussion of the carbon majors.⁴⁴ Counteraction in the cause of mitigating climate change could, for instance, mean that a ‘clean-up also needs to include denouncing and de-funding trade associations, faux research institutes, politicians, and lobbies that disseminate dis-information about climate science’.⁴⁵ Corporations that have actively counteracted the worsening of climate change thus become less responsible compared to those who have lobbied and supported the production of disinformation about climate change.

Similarly, Shue argues that – due to their political power, wealth, and technological capacities – the carbon majors should also promote a tax on carbon and support research into renewables that would end dependency on fossil fuels. These are forward-looking duties but, still, they are derived from the backward-looking duty to remedy. This follows from the rather simple fact that the temporal aspect of moral action makes blame temporally subsequent to an act of a moral breach.

⁴² Shue, note 1.

⁴³ Shue, note 1, 594.

⁴⁴ Grasso & Vladimirova, note 4, provide a similar analysis of ‘morally relevant facts’ that determine a carbon major’s responsibilities (moral rather than human rights, however). These are knowledge, timing, capacity, denial, and enrichment. These five criteria, or morally-relevant facts, as the authors prefer, are compatible with the three criteria suggested here to encompass the backward-looking responsibilities. However, I would stress that the apportionment of emissions is a morally relevant fact to address that is missing in Grasso and Vladimirova’s framework. They seem to leave it out because they distinguish between causal and moral responsibility, and proportion can be seen as mere causal responsibility, which by itself does not qualify as a sufficient reason for moral responsibility.

⁴⁵ Shue, note 1, 594-595.

Shue argues that corporations in general – and the carbon majors in particular – can be responsible for climate change, thus challenging the tradition of the UNFCCC’s commitment to state-centrism. This diverges from his standpoint of state-centrism in his earlier seminal publications on basic rights and climate justice. However, he also did concede that, depending on circumstance, when the state fails, non-state actors – such as corporations – can be duty bearers, obliged to secure basic rights.⁴⁶ Hence, in his recent work on the carbon majors, corporations are seen as qualified moral agents, ‘unless carbon producers are somehow exempt from the moral principles that society applies to ordinary mortals’, which he deems implausible since a ‘responsibility to shareholders is firmly constrained by other responsibilities’, meaning ethical responsibilities of the relevant kind.⁴⁷

3.1 Deriving Human Rights From Shue’s Basic Rights

Shue’s commentary on the carbon majors’ case does not explicitly mention the term human rights. So, it can be questioned if there is a leap of thought or a missing premise in the argument for attributing human rights duties to carbon majors based on Shue’s discussion, which is constrained to moral philosophy. However, there is a way to bolster the connection between prima facie moral duties of the carbon majors and the corresponding moral human rights duties they might accrue. The ‘bridging’ between the two can be found in Shue’s earlier work, where he defines basic rights as ‘the shield for the defenseless against ... loss of subsistence. ... They specify the line beneath which no one is to be allowed to sink’.⁴⁸ Hence, if the situation of the climate vulnerable is a case of harm to basic rights, there is reason for framing this as a human rights violation as well. The argument goes as follows:

Shue leaves it relatively open what basic rights are, and does not provide a list of human rights that are also basic rights. However, some social, economic, and environmental human rights are also basic rights: ‘by minimal economic security, or subsistence, I mean unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter and minimal preventive health care’. In other words, the idea is to be able to pursue a ‘reasonably healthy ... life of more or less normal length, barring tragic interventions’.⁴⁹

⁴⁶ Henry Shue, *Basic Rights – Subsistence, affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1996), 167-168.

⁴⁷ Shue, note 1, 594-595.

⁴⁸ Shue, note 46, 18.

⁴⁹ Ibid 23.

It is, therefore, fair to claim that Shue's notion of a basic right could be invoked to justify or underpin human rights. For instance, the Philippines' Petition mentions violations of life to the highest attainable standard of physical and mental health, to food, to water, to sanitation, to adequate housing, and to self-determination. These concerns show an overlap between basic rights and human rights.

Wettstein also refers to Shue's basic rights in his argument for why businesses should carry positive duties which go beyond mere respect for human rights. Wettstein argues that 'three types of obligations [which] are the duty to avoid depriving, the duty to protect from deprivation, and the duty to aid the deprived'⁵⁰ follow from Shue's definition of basic rights. These obligations or duties are analogous to the 'typology that underlies also Ruggie's tripartite framework'⁵¹ of 'protect, respect and remedy'.

Thus, Wettstein claims that acknowledging basic rights entails human rights duties to protect, respect, and remedy. Therefore, the carbon majors could be obligated, following Wettstein's reading of basic rights, by positive duties to provide for human rights protection and remedy to the victims of climate change. Thus, corporations are not absolved from accruing the full set of duties mentioned in the UNGP, otherwise deemed to be the exclusive prerogative of the state. Note, the degree of 'severity' or 'salience' that pertains to basic rights determines whether moral concerns translate into human rights concerns.

In the next three subsections, the three criteria which determine the backward-looking duties that corporations must discharge to satisfy their historical responsibility for human rights, are discussed. These criteria are proportion, culpable knowledge, and counteraction.

3.2 Proportion/Apportionment

The first criterion for determining the duty to remedy is the proportion to which a corporation has causally contributed to climate change. The fact that 'nearly two-thirds of historic carbon dioxide and methane emissions' can be attributed to 90 corporations – the majority of which (50) are investor-owned, while 30 are state-owned – is in itself an indication of how proportionality lends itself to the imagination of guilt and responsibility.⁵² The notion of responsibility for harms to the environment

⁵⁰ Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) *Business Ethics Quarterly*, 752.

⁵¹ *Ibid* 753.

⁵² Heede, note 5, 238.

is already acknowledged in mainstream environmental law as the ‘polluter pays’ principle, also debated in the literature on climate justice.⁵³ Heede’s study demonstrates that science is already making it possible to prove sufficiently credible causal links from corporate emitters to the current levels of rising seas and carbon dioxide in the atmosphere. This is, of course, not sufficient to account for a completely causal link between a typhoon in the Philippines which causes a substantial death toll and the 3.52 per cent share of historical emissions attributable to Chevron. Nonetheless, even a small share of historic emissions signals a substantial impact on climate change due to historical cumulative emissions. And the entire oil, coal, gas, and cement industries – which Heede investigates – are indisputably causally responsible for climate change when taken as a collective.⁵⁴ Hence, both the top corporate emitters and the industrial collective can be said to violate human rights, in the sense that they contributed to the disruptive effects. This can be called the condition of proportional causal responsibility. Now, the question about the level of complicity in upholding the industrial complex of the carbon majors is relevant.

Caney envisages complicity thus:

... the case of firms that consume high levels of fossil fuels but then export the products (or services) to foreign consumers. Who is responsible for the emissions? One might focus on the process of production and ascribe the emissions to those who actually burn the fossil fuels or produce cement. On the other hand, one might argue that responsibility should be accorded to the consumers because it is their demand that, at least in part, leads to the process that causes emissions. We thus have a producer-based and a consumer-based approach.⁵⁵

⁵³ Caney, note 19.

⁵⁴ Arguments for a shared responsibility might also underpin sector-responsibility. However, shared responsibility is mainly considered as forward-looking, so it is problematic to deem it backward-looking in order to require that a sector, or a group of corporations, remedy or compensate. Examples of historical rectification for past injustices done by nation-states could provide the baseline for an argument, though.

⁵⁵ Simon Caney, ‘Justice and the distribution of greenhouse gas emissions’ (2009) 5(2) *Journal of Global Ethics*, 135, distinguishes between *trade-related* and *product-related* emissions. David Victor has expressed a similar criticism of the blaming of the carbon majors: ‘It’s part of a larger narrative of trying to create villains; to draw lines between producers as responsible for the problem and everyone else as victims. Frankly, we’re all the users and therefore we’re all guilty. To create a narrative that involves corporate guilt as opposed to problem-solving is not going to solve anything’. In the same article, Richard Heede responds that ‘I as a consumer bear some responsibility for my own car, etcetera. But we’re living an illusion if we think we’re making choices, because the infrastructure pretty much makes those choices for us’ (D. Starr, ‘Just 90 companies are to blame for most climate change, this ‘carbon accountant’ says’, *Sciencemag.org* (25 August, 2016) (accessed 16th September 2019)) <https://www.sciencemag.org/news/2016/08/just-90-companies-are-blame-most-climate-change-carbon-accountant-says>

The carbon majors' case discussed in this article thus represents a 'producer-based' approach, but it is also legitimate to ask what kind of responsibility consumers might have, in this case. However, consumers – on average – might not have been as well informed as the corporations were about anthropogenic climate change.

3.3 Culpable Knowledge

Anthropogenic climate change was not, however, generally and publicly acknowledged as a problem before the establishment of the UN IPCC in 1988 (and the publication of the IPCC First Assessment Report in 1990). Heede's research provides evidence that more than half of all historical emissions have happened from 1988 to today, so ignorance over the last three decades cannot easily be pleaded by the carbon majors.⁵⁶ Moreover, since several of the major oil companies had inside knowledge about the link between greenhouse gases and climate change well before 1990, an excuse of ignorance about climate change is not credible. Exxon, for instance, had a group of scientists who had already issued an internal warning about climate change in the 1970s, but these scientists were silenced, and Exxon instead instigated intensive lobbying from 1989 to 2002 – together with other major oil companies – through the Global Climate Coalition, in order to convince politicians and regulators that there was a lack of evidence for anthropogenic climate change. For instance, there is evidence that the Global Climate Coalition succeeded in persuading the US government to reject the Kyoto Protocol in 1997.⁵⁷

There are suggestions that the denial of – and willful forgetting of a responsibility for – historic emissions signifies a situation comparable to that of the tobacco industry as it became evident that smoking posed serious risks to human health. The tobacco industry tried to suppress information and manipulate the public to protect its market, and thus incurred lawsuits for malevolent practice.

The question of *historic* corporate social responsibility (CSR) and the *forgetting* of corporate irresponsibility has recently been given some attention in the research literature.⁵⁸ What historic

⁵⁶ Frumhoff et al, note 8, 164.

⁵⁷ Ibid 162; Neela Banerjee, 'Exxon's oil industry peers knew about climate dangers in the 1970s too', *Inside Climate News*, (December 22, 2015), <https://insideclimatenews.org/news/22122015/exxon-mobil-oil-industry-peers-knew-about-climate-change-dangers-1970s-american-petroleum-institute-api-shell-chevron-texaco> (Accessed 22 September 2019).

⁵⁸ Judith Schrempf-Stirling, Guido Palazzo, & Robert A. Phillips, 'Historic Corporate Social Responsibility' (2016) 41(4) *Academy of Management Review*; Mena Sébastien Mena, Jukka Rintamaki, Peter Fleming, & André Spicer, 'On the Forgetting of Corporate Irresponsibility' (2016) 41(4) *Academy of Management Review*.

processes can explain how and why a corporation accrues responsibility for its past acts and omissions? This gives rise to the notion of *intergenerational corporate actors* - that a corporate agent has a lifespan and an identity to which moral blame can be ascribed. Hence, 'from an intergenerational perspective, environmental disasters can also be discussed as cases of human rights violations'.⁵⁹

Corporate life stories are co-constructed by corporations and society at large, so corporations have a vested interest in influencing the narratives of their own pasts, because those affect their reputations and legitimacy. Corporate engagement can range from denial to confrontation and transparency, exemplifying ways to obtain and defend legitimacy in the societal context of institutional pressure and expectations. Thus, 'corporations that deny historic responsibility will, almost by definition, be least likely to learn from the past and be least sensitive to the challenges presented by current actions'.⁶⁰ However, if corporations are 'good-faith participants in the contest of narratives'⁶¹, they are less likely to lose legitimacy and be blamed for their past omissions. So, corporations participate in *mnemonic communities* where they can variously choose to manipulate media stories, silence stakeholders, or undermine the facts told about their past irresponsible acts.⁶² Stakeholder mnemonic communities can appear in the aftermath of corporate scandals. So, for instance, the case of corporate denial and the undermining of the scientific evidence (mnemonic traces) for the causes of climate change in the 1970s and 1980s, as was found in the oil industry, gives rise to new communities of former employees, academics, and activists who constitute a collective memory of the past.

The degree to which a corporation has culpable knowledge about its contribution to climate change depends on whether knowledgeable critics were silenced, whether it acted transparently and, in general, whether it admitted the knowledge it had. Thus, the criterion of culpable knowledge relies on the assumption that the epistemic duty to seek knowledge about one's impact on human rights in the context of climate change is far-reaching. The duty to seek knowledge is part of proper due diligence, as also advised by the UNGP (2011). Thus, those corporations which emitted most during the last couple of decades have carried a particular duty to seek knowledge about their climate impacts. Saudi Aramco is a case in point. This leads to the question of whether or not such knowledge is a reason for action, which is dealt with under the next criterion of 'counter-acts'.

⁵⁹ Schrempf-Sterling et al, note 58, 715.

⁶⁰ Ibid 713.

⁶¹ Ibid 715.

⁶² Mena et al, note 58, 725.

3.4 Counter-acts

As mentioned, the choice of the industrial collective to join intensive lobbying through the Global Climate Coalition in the 1990s reveals their intentional disregarding of scientific fact. So, the third criteria for attributing responsibility for the past is whether or not a corporation chose to counteract climate change, in particular, by counter-acting on the potential negative impacts on human rights. The aforementioned openness about, and support of, the best available climate science – for instance, by stopping the funding of climate deniers in ideological think tanks – is an example of corporate counter-acting, as would supporting a tax on carbon emissions.⁶³ Another possibility for counteraction would be to actively help with adaptations to increase resilience. What is particularly critical is the Jekyll and Hyde personality of the carbon majors, according to a recent report from 2019.⁶⁴ Publicly, the carbon majors brand themselves as embarking on new business models and a transition to renewables. But the reality is that they continue to lobby against regulation through their industrial associations. Hence, acts of greenwashing are the opposite of counter-acting, and they therefore accrue higher levels of a responsibility to remedy. On the other hand, if companies acted like good corporate citizens who proactively and voluntarily mitigate climate change, collectively participate in adaptation efforts, and help victims to secure proper access to remedies for losses and damages, this would reduce their backward-looking duties to remedy. However, it will matter at what point in time a corporation counter-acts. Late indulgence should not reduce the burden of earlier breaches of counter-action, as this would be an easy means by which to escape historical responsibility.

In concert, the criteria of proportionality, culpable knowledge, and counter-acts attribute the level of historical responsibility for remedying harmful climate change.

4. FORWARD-LOOKING POSITIVE DUTIES – SHARED RESPONSIBILITY

Even when there is no historical responsibility, there can still be a forward-looking positive responsibility to mitigate, adapt, and remedy, which falls upon all non-state corporate agents. This is

⁶³ Shue, note 1.

⁶⁴ Influence Map, *Big Oils Real Agenda on Climate Change: How the Oil Majors have Spent \$1Bn Since Paris on Narrative Capture and Lobbying on Climate*, (London: Influence Map, March 2019) <https://influencemap.org/report/How-Big-Oil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddd> (Accessed 22 September 2019)

due to the fact that climate change can be considered a structural problem which is caused by many actors within a system of modern industrialization and consumption patterns.

Young's argument for shared responsibility as forward-looking takes its starting point in human rights violations in cases where a corporation, a state or some other agent within a structure of supply chains (in the apparel industry) directly – or by some level of complicity or linkage with the harms – violates the rights of individuals. A typical example is the violation of workers' human rights in the supply chain as in the case of sweatshop labor. Even though the corporation may not be directly causally responsible for the human rights violation, as it is only connected to sub-contracted sweatshop labor or benefits from sub-contracting, a causal chain – or what Young calls a 'social connection' – may still be reconstructed between the corporation and the worker.⁶⁵ However, in situations where the entire production system of a complex supply chain in itself generates structural injustice and human rights violations, it can be difficult, if not impossible, to single out individual perpetrators causing the harm. Rather, they are all connected to varying degrees in upholding the system within which they are positioned. The point is, only through collective and political sorts of action will it be possible to reform the system – blaming individual agents to make them responsible for changing the future layout of the system will not result in the reforms required to remedy the structural injustice that the system produces.

The case of climate change is similar, as Young also makes clear in her writing about Hurricane Katrina, which hit the Gulf Coast of the United States in August 2005, and which could not be remedied by tort law.⁶⁶ The causal responsibility for harms done by climate change is difficult to trace to relevant corporate emitters, apart from the clear-cut example of the carbon majors. Hence, the case of climate change poses a problem of forward-looking responsibilities that require a more relational understanding of responsibility than the individualist one enshrined in the liability model of tort law.

4.1 Young's Parameters of Reasoning

⁶⁵ Iris Marion Young, 'Responsibility and global justice: A social connection model' (2006) 23(01) *Social philosophy & policy*; Young, note 9. The call for a *relational* understanding of corporate involvement in climate change by Seck (note 4), is to some extent, found in Young's social connection model. Young's forward-looking model of assigning shared responsibility is a modification of the liberal liability model which limits responsibility to individuals, corporate legal persons, or sovereign states.

⁶⁶ Iris Marion Young, 'Katrina: Too Much Blame, Not Enough Responsibility' (2006) 53(1) *Dissent*.

The proposed typology of human rights (see ‘Figure 1’) also relies on Iris Marion Young’s theory of forward-looking responsibility to build an account of how corporations can perceive their responsibilities with regard to climate change.⁶⁷ These are responsibilities with regard to the impact on human rights which are threatened by climate change.

The typology states that forward-looking duties are of two kinds: a general and negative one of avoiding harm, and special and positive duties to do good to a selected person or group of people. The reason why there are no general and positive forward-looking duties is because this would require that a good is owed to all people all of the time. Apart from the practicalities involved in this injunction, it is also difficult to imagine what this would mean in the context of climate change unless emission reductions are interpreted as positive duties, which is possible.⁶⁸ Another option is left out: forward-looking special and negative duties, since this would mean that one should avoid harming particular persons or groups of people. But, since this injunction is a subset of the general negative duty not to harm, it makes little sense to keep this duty on the table.

Hence, the interesting forward-looking duty is a special and positive duty to do good to x, which translates into protecting, respecting, or remedying human rights as they are broadly understood. In terms of human rights, such a duty would be equivalent to positive rights such as social and economic rights but, in fact, any recognized human right is within the scope of consideration. We owe distributive justice to the needy or the worst-off, or those who would benefit the most in terms of utility or welfare. This invokes a standard of justice that can be used in determining the content of such forward-looking duties.⁶⁹ So, it could be argued that the criteria – what Young calls the *parameters of reasoning* for responsibility: corporate power, privilege, interest, and collective ability – need further supplementation with standards of justice. The same could be argued in the case of backward-looking responsibilities - that we need some normative standard to assess the levels of contribution to, culpable knowledge of, and counteraction of climate change. However, human rights entail an egalitarian moral conception of the minimal thresholds of human freedom, dignity, and equal worth (as expressed in the Universal Declaration of 1948), below which no humans should live and – in this sense – human rights are side-constraints on any proposed theory of justice to determine the normative standards by which responsibility should be assessed. The focus here is the egalitarian

⁶⁷ Young, note 65, 2006, 125-130; Young, note 9 2011, 142-151.

⁶⁸ Grasso & Vladimirova, note 4.

⁶⁹ Christian Neuhäuser, ‘Structural Injustice and the Distribution of Forward-Looking Responsibility’ (2014) 38(1) *Midwest Studies in Philosophy*.

feature of human rights that most, if not all, theories of justice and responsibility should reflect. Therefore, I shall not explore further the details of a comprehensive theory of justice which would be needed to give a fuller account of forward-looking human rights duties in the context of climate change.⁷⁰

The leverage of the parameters also raises a question about the significance of distance in time and space, and their relationship to the level of corporate responsibility. Is a local corporation situated in Louisiana, for instance, more responsible for remedying the problems of the victims of Hurricane Katrina than a corporation in Los Angeles, merely by satisfying a criterion of physical proximity? The UNGP do not place particular significance on physical proximity, as responsibility also follows from weaker connections of complicity such as merely being *linked* to negative human rights impacts.⁷¹ Concerns about the pragmatism of discharging human rights duties and the feasibility of finding duty bearers, however, could be a reason for asserting that proximity should count in favor of stronger duties. There is an insight in communitarian thinking, also acknowledged in the republican notion of corporate citizenship, that location matters – that special local moral bonds exist that may have normative importance for corporate duties owed to the community.⁷² Since human rights are, by definition, liberal universal norms, they put the notion of communitarian corporate citizenship – and particular local human rights obligations – at odds with the injunction to treat all humans as equals, regardless of the contingencies of physical location and proximity. Thus, corporate human rights duties might take into consideration the aspect of proximity to discharge duties effectively, but it cannot *per se* work as a legitimate reason for rejecting duties owed to far-away rights holders. Here follows how the criteria of power, privilege, interest, and collective ability should be interpreted in the context of corporate human rights responsibilities, in concerns about human rights.

⁷⁰ Caney, note 19, could be an example of situating climate justice in a more comprehensive context of a theory of justice, a cosmopolitan one. Neuhäuser, note 69, explicitly argues that Young needs a fuller theory of justice to determine the content of duties from the parameters of reasoning.

⁷¹ UNGP, note 1.

⁷² Andrew Crane, Dirk Matten and Jeremy Moon, 'Ecological Citizenship and the Corporation – Politicizing the New Corporate Environmentalism' (2008) 21 *Organization & Environment*.

4.1.1 Power

The criterion of power, according to Young, elicits particular responsibilities on those ‘where they have a greater capacity to influence structural processes’.⁷³ So, power is defined not in terms of financial or technological means (as in the common but differentiated terms of responsibility), but in terms of an influence on the structural processes. This is significant because the harms from climate change concern wider structural processes that subsequently impact on human rights. So, for instance, the carbon majors are powerful in terms of both finances and technology, and also as agents with influence on the system that drives climate change. However, by focusing on the means of adaptation and remedy (compensation for loss and damage), the sheer power of a corporate entity might be relevant. The ‘ability to pay’ principle is a core point of reference in the theory of climate justice, and it might elicit certain duties from the wealthy and powerful, regardless of their impacts on the system which causes climate change. This might be true particularly if they are also beneficiaries of this system; for instance, if they rely heavily on a fossil fuel-based business model, such as most of the transportation sector (aviation, car producers, train companies, or the shipping industry).

4.1.2 Privilege

Therefore, being a beneficiary or somehow privileged in ones’ position in the ‘climate system’, will elicit stronger reasons for discharging the duties of a responsible corporation, taking the full account of human rights impacts into consideration. The powerful are usually positioned on the privileged end of the system, benefiting from the structural injustices that the system produces. The loose connection that the privileged might have to the victims of the system is still considered relevant to human rights. In the recently published *Framework Principles on Human Rights and the Environment*, the discussion on businesses’ responsibility for environmental impacts on human rights refers to the UNGP: ‘Business enterprises should conduct human rights impact assessments in accordance with the UNGP, which provide that businesses “should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships”’.⁷⁴

⁷³ Young, note 9, 144.

⁷⁴ Office of the High Commissioner for Human Rights (OHCHR 2018 – the ‘Knox Report’) ‘Framework Principles on Human Rights and the Environment’, (March 2018, A/HRC/37/59), 13
<https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf> (accessed 22 September 2019).

4.1.3 *Interest*

The criterion of interest states that even the victims of the system ‘contribute to the structural processes that produce injustice’, and therefore share responsibility.⁷⁵ This sounds counterintuitive, as they are victims with no influence. However, Young envisages that workers in sweatshops, or at least in the lower echelons of the global supply chains, are agents to be considered as well. Similarly, climate victims are not mere passive recipients, but are, in fact, co-creators of the injustice in the situation. The Philippines’ Petition is a case in point, showing how human rights litigation processes are an instrument for voicing a (vital) interest in climate change. In this sense, the criterion of interest deems responsibility as being shared in order to be acknowledged, not only by a corporation, but also by relevant stakeholders. The instrumental understanding of stakeholder engagement, where the corporation is asymmetrically positioned in approaching the ‘weak’ stakeholders, is challenged by the criterion of interest which leverages a normative conception of stakeholder processes. Corporations with a sustainable business model of decarbonization might also have vested interests in climate change, but from a positive viewpoint. And, in fact, the rather vague notion of ‘interest’ could be interpreted to include also corporations whose interests in the impact of climate change on human rights are difficult to predict. The criteria are all non-exhaustive, since they do not give clear limits and definitions on who is included as relevant agents.

4.1.4 *Collective ability*

Collective ability is at the core of shared responsibility. Collective ability is a form of power that organizations can wield to coordinate actions among many agents. Young mentions that stockholder organizations ‘can exercise significant power not because they can coerce others to do what they decide, but because they have many members who act together’.⁷⁶ So, those corporations with the means to mobilize extant numbers of agents in order to undermine structural injustices – in this case violations of human rights – have particular forward-looking positive and special responsibilities. The criterion of collective ability should be seen as opposing the tendency to ascribe moral responsibility to individual corporations. The individual carbon majors, for instance, might exhibit great collective ability, but what would really initiate reform is if the entire industry to which the

⁷⁵ Young, note 9, 146.

⁷⁶ Ibid 147.

carbon majors belong – for instance through their industrial associations – began to coordinate efforts. The prospects for collective action are, however, bleak from the viewpoint of the so-called collective action problem, i.e. the ‘tragedy of the commons’ outlined by Gareth Hardin in 1968 in reference to grazing herds, but now relevant to climate change in respect to the depletion of the atmosphere as a common good.⁷⁷ To ensure compliance, institutions which regulate emissions at the corporate level must be in place. For instance, to realize the 1.5°C target mentioned in the Paris Agreement and now recommended in the IPCC Special Report from 2018⁷⁸, an institutional setup is required and cannot be expected from corporate-driven voluntary collective initiatives. For this purpose, human rights and the legal instruments of the UN have unanimously recommended positive duties to promote and build institutional capacity in order to mitigate and adapt to climate change, which is also supported in current theories of corporate citizenship and political corporate social responsibility.⁷⁹

The concept of corporate citizenship – in particular the ‘extended’ version referred to in this context – can be helpful in framing the corporate collective ability involved in the corporate response to climate change.⁸⁰ It is a key premise in extended corporate citizenship theory that state governance is absent or weak: what is called government-failure. This creates a ‘regulatory vacuum’⁸¹ in which civil society actors, such as consumers and critical NGOs, often expect corporations to take over state responsibilities. The example of the US’ withdrawal from the Paris Agreement and the subsequent corporate denouncement of Trump in the ‘we are still in’ campaign testifies to this. The proactive corporate approach, in partnership with civil society, elicits new ‘bottom-up’ governance as a response to the failure of successive climate negotiations in the UN system.⁸²

⁷⁷ Elinor Ostrom, ‘A Polycentric Approach for Coping with Climate Change’ (2009) *Policy Research Working Paper*, World Bank. (Accessed 22 September 2019): <http://dx.doi.org/10.1596/1813-9450-5095>

⁷⁸ IPCC – International Governmental Panel on Climate Change (2018). *Global warming of 1.5°C. Summary for policymakers*. The IPCC Special Report. (Accessed 22 September 2019): https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf

⁷⁹ Nien-he Hsieh ‘Does Global Business Have a Responsibility to Promote Just Institutions?’ (2009) 19(02) *Business Ethics Quarterly*; Andreas G. Scherer and Guido Palazzo, ‘The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy’ (2011) 48 *Journal of Management Studies*.

⁸⁰ Dirk Matten & Andrew Crane, ‘Corporate Citizenship: Towards an Extended Theoretical Conceptualization’ (2005) 30 *Academy of Management Review*. The notion of perceiving the corporation as a political agent, or a ‘quasi-state’ is taken as providing the premise for an argument that corporations have extensive human rights duties that cannot be reduced to showing mere ‘respect’ for human rights. Proponents of this view, which is also supported in this article, are Wettstein, note 1 and Arnold, note 20.

⁸¹ Scherer & Palazzo, note 79.

⁸² Jo Dirix, J. et al, ‘Strengthening Bottom-up and Top-down Climate Governance’ (2013) 13:3 *Climate Policy*

Proponents of the ‘ecological corporate citizenship’ approach (which is extended corporate citizenship applied to the environment) argue that ‘the obligations suggested by ecological citizenship not only go further than simply minimizing one’s impact but also extend to participation in the political process with other actors in designing effective solutions to global problems such as climate change’.⁸³ Furthermore, ‘a refusal to acknowledge any political role, either as a self-interested participant in public deliberation on how to tackle climate change, or as an institution that mediates political preferences for real citizens, or as a political actor with real obligations to other citizens that it affects through its resource needs, can be challenged through the lens of ecological citizenship’.⁸⁴ Similarly, forward-looking positive and special duties of climate change are supported in the related theory of political CSR. In a recent update to the definition of political CSR, the following list of concerns are mentioned: ‘corporate contributions to different areas of governance, such as public health, ... the enforcement of social and environmental standards along supply chains or the fight against global warming’.⁸⁵ Assuming that corporations acknowledge their duties of ecological citizenship, this obliges them to collaborate in establishing institutions with the aim of mitigating climate change. Hence, ecological corporate citizenship could provide an argument as to why corporations should consider climate change as a human rights issue.

However, the argument from extended or ecological corporate citizenship does not provide sufficient explanation as to exactly why the civic duties they carry are best understood in terms of human rights. Such duties are primarily related to the rights of citizenship, limited to being a citizen of a nation-state, even though Crane, Matten, and Moon also take citizenship to include some form of cosmopolitan citizenship.⁸⁶ This is also relevant in relation to John Ruggie’s ascription of human rights responsibilities to non-state agents, such as the corporation, in cases where the state would not be able to fulfill its human rights obligations.⁸⁷ Hence, there is no excuse for private businesses stepping aside from human rights responsibilities on the grounds that the state is absent or weak. Rather, such critical situations provide reasons for raising the expectation that businesses deliver on

⁸³ Crane, Matten and Moon, note 72, 386.

⁸⁴ Ibid.

⁸⁵ Andreas G. Scherer et al, ‘Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0’ (2016) 53:3 *Journal of Management Studies*, 53:3, 276.

⁸⁶ Crane, Matten and Moon, note 72; cf. Florian Wettstein and Sandra Waddock, ‘Voluntary or Mandatory: That is (not) the Question: Linking Corporate Citizenship to Human Rights Obligations for Business’ (2005) 6/3 *Zeitschrift für Wirtschafts- und Unternehmensethik*.

⁸⁷ The formulation of the UNGP is clear on this point: ‘The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations’ UNGP 2011, note 1, 13.

human rights. In this particular sense, there is consensus among proponents of extended corporate citizenship, political CSR, and the UNGP to support the criterion of collective ability as a forward-looking duty to uphold human rights.

5. ASSESSMENT OF THE UNGP, OSLO PRINCIPLES, AND THE ENTERPRISE PRINCIPLES

In this section, a general assessment of the current legal documents with (assumed) relevance for guiding corporations on the topic of climate change and human rights is undertaken. It is not possible to go into detail, but the intent is to draw out the general implications for business and to assess how these documents cohere – or do not – with the typology proposed in this article.

As the topic of ‘climate change’ is not explicitly addressed in the UNGP, and since John Ruggie has only made scant mention of it in his role as Special Representative to the UN – conceding the fact that climate change has risen considerably on the agenda since the UNGP launch in 2011 – it is still not clear whether this subject counts as a human rights concern relevant to business corporations.⁸⁸ However, at a UN meeting concerning the relationship between the UN Sustainable Development Goals (SDGs) and the UNGP in Geneva in 2016, Ruggie argued that, if corporations were to take human rights seriously, they should not cherry-pick among the 17 SDGs, since ‘this is a fundamental difference between human rights and climate change: in human rights there is no equivalent to buying carbon offsets’.⁸⁹ According to Ruggie, human rights are an absolute standard that cannot be reconciled with the allegedly more relative measures relevant to tackling climate change. Even though the UNGP document does not explicitly mention climate change as a topic of concern, it mentions, as part of the due diligence process, that enterprises should assess their ‘environmental’ impacts on all human rights.⁹⁰

Environmental impacts on climate change are referred to as, for instance, issues related to water and health. Such impacts are typically local and caused by pollution from a production facility. But climate change is different since it is not local, but rather trans-boundary and global. Moreover, the timescale from emissions to actual changes in the climate is extensive. However, it is possible to

⁸⁸ Seck, note 6, 14.

⁸⁹ *ibid* 2. Also mentioned in Office of the High Commissioner for Human Rights (OHCHR 2012) ‘The corporate responsibility to respect human rights – an interpretative guide’, 15 https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (accessed 22 September 2019).

⁹⁰ UNGP 2011, note 1, 20.

interpret the UNGP in the context of climate change, given that the human rights impact from climate change is significant, and corporate emissions contribute to the harms. Hence, to *respect* human rights, corporations should have processes of due diligence and assessments of their responsibility for causing climate change and, if they are culpable, they should also clarify how to engage in processes of remedy to climate victims. As already mentioned, this reading of the UNGP seems obvious, but by acknowledging that climate change is a special and contested topic, and not identical to environmental degradation and pollution, this interpretation should be tempered with some reservation. According to the typology proposed in this article, proper due diligence must integrate an assessment of climate change impacts on human rights. It is a fault on the part of the UNGP that the issue of climate change has not been taken explicitly and comprehensively into consideration. Hence, the typology challenges the UNGP and the practice of leaving climate change out of the scope of due diligence since seeking knowledge about business impacts on human rights in the context of climate change, is pivotal to determining the level of responsibility one might accrue.

Other legal instruments circulating among policy makers and legal consultants address corporate human rights responsibilities and climate change. The International Bar Association issued the *Achieving Justice and Human Rights in an Era of Climate Disruption* report in 2014, arguing that ‘corporations should adopt and promote the UN Guiding Principles on Business and Human Rights as they pertain to human rights and climate change’ and, further in the same document, admitting that ‘there is no direct explanation in the Principles as to the interplay between climate change and human rights’. The report restates the state-centric approach of the UNGP, and claims that ‘the impetus is on states ... to regulate corporates and multinationals within their jurisdiction as part of their efforts to mitigate and adapt to climate change’.⁹¹

Other significant instruments are the *Oslo Principles on Global Climate Change Obligations* issued by a group of legal experts in 2015, followed up in 2018 by the *Principles on Climate Obligations of Enterprises*. The Oslo Principles, according to Seck, ‘appear to focus on assessment and disclosure of harms to the enterprise itself, or its investors, rather than harm to rights-holders’.⁹² With regard to burden-sharing and the moral duty to avert climate change, the Oslo Principles are less conservative than the UNGP, as ‘the primary legal responsibility rests with States and enterprises’.⁹³ Hence, business corporations are on a par with states, being equal duty bearers. The Oslo Principles explicitly

⁹¹ International Bar Association, note 5, 148.

⁹² Seck, note 6, 10.

⁹³ Oslo Principles on Global Climate Change Obligations (2015)

<https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations> (accessed 22 September 2019).

mention human rights as invoking a collective responsibility, as a ‘network of intersecting sources provid[ing] States and enterprises with obligations to respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere’.⁹⁴

In the follow up document, *Principles on Climate Obligations of Enterprises*, there is a 300-page elucidation of why and how corporations can and should contribute to mitigating – rather than adapting or remedying victims of – climate change. The crux is that enterprises become responsible for climate change due to state failure, and that a precautionary approach must be taken in order to aim for the 1.5°C target of the Paris Agreement. However, the conservative approach from the Oslo Principles is continued in its recognition of a rather narrow scope of relevant stakeholders, as for instance in Principle 18 those ‘likely to be directly or indirectly affected by the enterprise’s activities, including investors, shareholders, clients, financiers, employees, securities regulators and the public’.⁹⁵ No mention of the climate vulnerable in the global context is made; rather, a conventional set of corporate stakeholders is mentioned. In the commentary the Association states that ‘Our principles are of a legal nature. It is open to debate whether they go beyond or stay below moral responsibilities, despite the fact that we believe that the law mirrors moral duties in this area of discourse’.⁹⁶ The Principles are aspirational and intended to contribute to *opinio juris*.⁹⁷ But, at the same time, the Principles are drafted to ‘devise workable emission reduction and other climate change related obligations that are based on a (sometimes arguably bold) interpretation of the existing law’. Mentioning the Philippines’ Petition, human rights litigation is perceived to be primarily a management risk factor, since ‘one cannot take it for granted that courts around the globe will abstain from issuing damages awards in the future’.⁹⁸ The text also explicitly recognizes that, recently, a larger number of legal documents, laws, and pledges appeal to human rights, and ‘that is relevant because ... climate change has a human rights dimension’, but this is relevant for the sole reason that ‘there is a fair chance that business as usual will give rise to a plethora of claims for damages against enterprises unwilling to curb their GHG [greenhouse gas] emissions’.⁹⁹ Of particular concern is the concept that business responsibilities are tied to the jurisdiction of the host nation-state. Hence, ‘[a]s a rule of thumb, our principles tie the reduction obligations of most enterprises to the obligations of

⁹⁴ *ibid.* 3.

⁹⁵ Expert Group on Climate Obligations of Enterprises, note 6, 7.

⁹⁶ *Ibid.* 38.

⁹⁷ *Ibid.* 39.

⁹⁸ *Ibid.* 40.

⁹⁹ *Ibid.* 41.

the respective countries.’¹⁰⁰ This builds on the assumption that countries live up to the Paris Agreement, but what if they don’t?

The *Principles on Climate Obligations of Enterprises*, though presenting a very comprehensive document that seeks to appeal to corporate self-interest, might show the way in terms of initiating some changes, but it remains a rather conservative contribution with little support for the human rights-based approach to business and climate change.

As a general assessment of the UNGP, the Oslo Principles, and the Principles on the Climate Obligations of Enterprises, this section has showed that the current regime that guides corporations rather lags behind with respect to admitting human rights duties and responsibilities towards the climate vulnerable. The typology proposed here in this article demands that corporations have explicit human rights responsibilities, and that these require a human right framing of both historical, as well as forward-looking, responsibilities. The UNGP lacks explicit advice on this topic, while the Oslo Principles and the Enterprise Principles both tend to be conservative about the human rights and duties owed to the climate vulnerable. This is a shortcoming, from the perspective of the typology suggested in this article.

6. DISCUSSION/CONCLUSION

In this final section, three issues to clarify the implications of the typology are discussed: 1) Should corporate duties and responsibilities entail efforts to mitigate, adapt, and remedy (e.g. compensate for loss and damage)?; 2) How do the typology and the common but differentiated responsibilities, as laid down in international climate law of the UNFCCC in 1992, connect?; and 3) What are the prospects for achieving a complete normative theory for businesses’ human rights duties in the context of climate change?

1) In the introduction to this article, the OHCHR was quoted as stating that ‘businesses are also duty-bearers. They must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights’. By now, the default option to settle only for mitigation is no longer legitimate. In its reading of both Shue and Young, the proposed typology makes it clear that corporations also have responsibilities to assist in adaptation efforts, and in particular with regard to backward-looking responsibilities, they should also compensate for damage and loss. The tendency to reduce corporate responsibilities to duties to

¹⁰⁰ Ibid. 49.

mitigate, usually by reducing their own emissions, is therefore critiqued by the entire normative framework built into the typology. One main reason for this is the fact that climate harms appear in the guise of many human rights impacts, ranging from threats to basic rights of subsistence (as claimed in the Philippines' Petition), to also include derived effects on social, economic, and cultural rights. The typology needs to be applied to real-life examples of such problems to test its feasibility, which is beyond the scope of this article.

A closely connected question is whether compliance with the 1.5°C target is sufficient to fulfill human rights obligations. It is clear that even if the rather ambitious target is met, the livelihoods of a large proportion of humans will still be endangered. So, human rights are not secured by staying within this target. On the other hand, since it is an ambitious target that will require sacrifices, it would be wrong-headed to simply dismiss the target on the grounds of human rights. The flag to raise here will therefore be one of ensuring awareness of the risks of human rights complacency in committing to the 1.5°C target.

2) The typology is fully compatible with the spirit embodied in the common but differentiated responsibilities that apply to nation-states. For instance, the typology stresses that responsibilities are to be understood as both global (intra-generational) and prospective in time (inter-generational). Hence, it is incorrect to infer that corporate responsibilities are tied to the nation-state, and therefore a corporation's host country determines their level of responsibilities. This is what the Enterprise Principles from 2018 recommend. The typology does not constrain corporate responsibilities to the jurisdiction of the country or countries of its operations, but follows the UNGP in ascribing global responsibilities in accordance with impact. The criteria of forward-looking responsibilities – power, privilege, interest, and collective ability – provide guidance that is equivalent to the common but differentiated responsibilities.

This does not mean that corporations (whether investor-owned or state-owned) are not special compared to states. The typology is not crafted to define the exact difference between the state and the corporation. Instead, it provides a tool for testing what responsibilities corporations can have in terms of human rights vis-à-vis the climate vulnerable. Hence, this also signals an embracing of the political power and role that corporations can have, even though they are not legitimate in the same sense as states (if they have proper democratic institutions and the rule of law in place). The extent of corporate responsibility should not be dismissed because corporations lack the features of statehood. And, this viewpoint is also fully compatible with claiming that states are the primary protectors of human rights.

3) What, then, are necessary and sufficient conditions for ascribing human rights duties to corporations in the context of climate change? The proposed typology for business and human rights duties in the context of climate change aims at offering the necessary conditions for ascribing responsibility. However, even though the typology might have captured important and highly relevant conditions, they remain contestable and non-exhaustive as further conditions, criteria, and amendments could be foreseen. Until then, the typology is an outline for further theory development and deliberation on the nature and facts of business and human rights in the context of climate change.

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