

6-2023

Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil

Danielle Anne Pamplona

Julia Stefanello Pires

Follow this and additional works at: https://opencommons.uconn.edu/law_review



Part of the [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Pamplona, Danielle Anne and Pires, Julia Stefanello, "Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil" (2023). *Connecticut Law Review*. 574.
https://opencommons.uconn.edu/law_review/574

CONNECTICUT LAW REVIEW

VOLUME 55

JUNE 2023

NUMBER 4

Essay

Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil

DANIELLE ANNE PAMPLONA & JULIA STEFANELLO PIRES

Climate change presents a threat not only to human rights but also to human existence. The United Nations Human Rights Council has recognised that climate change will lead to acute human rights violations, such as forced displacement and deprivation of the rights to housing, health, and personal integrity. Despite scientific warnings and academic debates, it remains necessary to seek effective measures to prevent, mitigate, and adapt to the causes and consequences of climate change. This Essay identifies the normative framework applicable to corporate activities and their relation to human rights and pauses at the United Nations Guiding Principles on Business and Human Rights and their suggestion for adoption of a human rights due diligence procedure. This procedure will serve to prevent and mitigate negative impacts as well as recognising measures for redress. Taking account of the normative development, this Essay investigates the Brazilian experience of protecting human and environmental rights, as well as the country's legislative protections and judicial decisions. The Brazilian system provides a tool to prevent damage from climate change, but climate litigation is also quickly developing. The Essay concludes that there is fertile ground in the country to impose an obligation on corporations to prevent damage resulting from climate change.

ESSAY CONTENTS

INTRODUCTION	863
I. CLIMATE CHANGE, CORPORATE ACTIVITY, AND HUMAN RIGHTS	865
A. CLIMATE CHANGE AND CORPORATE ACTIVITIES AS OBJECT OF REGULATION	865
B. RELATIONS BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE	869
II. HUMAN RIGHTS DUE DILIGENCE	871
A. REQUIREMENTS OF HRDD	872
B. THE HUMAN RIGHTS AT STAKE	873
C. THE INFLUENCE OF HRDD IN PRACTICE	874
D. BRAZIL'S APPROACH TO HRDD	878
III. CLIMATE LITIGATION AS A RESPONSE TO THE CRISIS AND THE DEBATES INVOLVING COMPANIES	879
A. MITIGATION LITIGATION: THE PRINCIPLES OF PREVENTION AND PRECAUTION	880
B. THE IMPOSSIBILITY OF REPARATION IN NATURA	882
CONCLUSION	883



Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil

DANIELLE ANNE PAMPLONA * & JULIA STEFANELLO PIRES **

INTRODUCTION

The relationship between economic activities and human rights is no longer a new topic of discussion. From the point of view of the advances generated by investments from private entities, there is much to be celebrated, including the facilities brought by technology, the advances in diagnosis and treatment in medicine, the agility in the provision of services from software innovations, and the development of means of transportation, among others. All this, however, does not preclude the observation that economic activities are often involved, directly or not,¹ with countless human rights violations, such as the forced displacement of people to allow for the exploitation of natural resources or the construction of large works, the use or sharing of personal data, and the deterioration of people's health through the consumption of harmful and toxic products. Many times, the negative impacts suffered by individuals and communities are due to the climate change phenomenon, which in itself might not be directly attributable to the economic activity, though its causes—the greenhouse effect—might be.

According to the nongovernmental organization Global Justice Now, of the one hundred largest economic entities in the world, sixty-nine are

* Full Professor of Law and Director of the Human Rights Clinic at Pontifícia Universidade Católica do Paraná (PUCPR); Visiting Researcher at the University of Oxford Bonavero Institute of Human Rights and at the Max Planck Institute for Comparative Public Law and International Law; Postdoctoral Fellow at American University Washington College of Law; Ph.D., Universidade Federal de Santa Catarina; Master, Pontifícia Universidade Católica de São Paulo (PUCSP); Co-President of the Global Business and Human Rights Scholars Association; Consultant for Business and Human Rights.

** Ph.D. Candidate in Socioenvironmental Law at Pontifícia Universidade Católica do Paraná (PUCPR); Master in Borders and Human Rights, Universidade Federal da Grande Dourados (UFGD); Business and Human Rights Analyst at Proactiva; Member of the Global Business and Human Rights Scholars Association; Member of the Latin American Climate Lawyers Initiative for Mobilizing Action (LACLIMA).

The authors thank the editors of the *Connecticut Law Review* for the accurate reading and many comments to the first version of this Essay.

¹ According to the United Nations Guiding Principles on Business and Human Rights (UNGP 19), corporations can cause or contribute to an adverse human rights impact, or its operations can be directly linked to the impact. U.N. Off. of the High Comm'r for Hum. Rts. [OHCHR], *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 20–21, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UNGPs].

companies and only thirty-one are countries.² In late modernity, the production of wealth is “accompanied by the social production of risks,”³ which constitute objects of distribution, as well as wealth, so that they form positions of threat or class.⁴ Although the greenhouse effect is a natural process that allows the Earth to maintain climatic conditions for the development of life as we know it, the excess emission of anthropogenic greenhouse gases (GHG) (i.e., those caused by humans) has resulted in an imbalance, causing extreme and unnatural changes.⁵ This is called climate change, which presents a threat not only to human rights but also to human existence. The United Nations Human Rights Council has recognised that climate change will lead to acute human rights violations, such as forced displacement and deprivation of the rights to housing, health, and personal integrity.⁶

A balanced environment is paramount to guaranteeing human rights. Climate change may cause disasters such as floods, droughts, and epidemics that contribute to massive violations of rights, which disproportionately impact the poorest populations.⁷ Although much has been discussed on the subject, given the urgency of the issue, it remains necessary to seek effective measures to prevent, mitigate, and adapt to the causes and consequences of climate change. This Essay is based on the Brazilian experience of protecting human and environmental rights, which has legislative protections and a progressive court in its interpretation of these rights. This Essay observes that the existing international instruments for dealing with the consequences of climate change are focused on state conduct, that is, there is no proper international regulation of business activities. Because international law has been structured around the figure of the State, it is inadequate for regulating business activities on an issue that clearly knows no boundaries, even though its urgency has deepened precisely because of the activities of large corporations.

Part I identifies two types of instruments—(1) international instruments that address climate change and its impacts on individuals; and

² *69 of the Richest 100 Entities on the Planet Are Corporations, Not Governments, Figures Show*, GLOB. JUST. NOW (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show>.

³ ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* 19 (Mark Ritter trans., Sage Publications ed. 1992) (1986).

⁴ ULRICH BECK, *WORLD AT RISK* 25–31 (Ciaran Cronin trans., Polity Press ed. 2009) (2007).

⁵ EXPERT GRP. ON GLOB. CLIMATE OBLIGATIONS, *OSLO PRINCIPLES ON GLOBAL CLIMATE CHANGE OBLIGATIONS* 11–12 (2015), <https://climateprinciplesforenterprises.files.wordpress.com/2017/12/osloprincipleswebpdf.pdf>.

⁶ Hum. Rts. Council Res. 41/21, U.N. Doc A/74/53, at 190–91 (July 12, 2019).

⁷ Econ. Comm’n for Latin Am. & Caribbean [ECLAC] & U.N. Off. of the High Comm’r for Hum. Rts. [OHCHR], *Climate Change and Human Rights: Contributions by and for Latin America and the Caribbean*, at 11, U.N. Doc. LC/TS.2019/94 (Sept. 30, 2019), https://repositorio.cepal.org/bitstream/handle/11362/44971/S1900999_en.pdf.

(2) instruments that address corporate conduct and its impact—and demonstrates the lack of communication between them. From this point, it discusses the applicability of instruments created to protect human rights where harm derives from anthropogenic climate change. Given the urgency of the issue and the need for measures that can prevent conduct that exacerbates climate change, Part II presents the instrument vaunted as the solution for identifying, preventing, and mitigating the risks that economic activities pose to individuals: human rights due diligence. It then points out the possibilities for this instrument to render significant results when applied to conduct that impacts human rights by emphasizing the risks of climate change. If it is impossible to prevent or mitigate risks, the only way out is through redress. Thus, Part III works with the current possibilities of redressing human rights violations within the judicial state framework, identifying the status quo of climate litigation and ascertaining its near future.

I. CLIMATE CHANGE, CORPORATE ACTIVITY, AND HUMAN RIGHTS

A. *Climate Change and Corporate Activities as Object of Regulation*

When referring to climate change, this Essay uses the definition adopted by the United Nations Framework Convention on Climate Change: “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”⁸ The U.N. document also helpfully defines “emissions” as “the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time,”⁹ and “greenhouse gases” as gases in “the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation,” contributing to the greenhouse effect in this process.¹⁰ Further, the Kyoto Protocol to the Convention indicates the “relevant sectors” for “promoting policies and measures which limit or reduce emissions of” GHG: energy, industrial processes, use of solvents and other products, agriculture, and waste generated by human activity.¹¹ In 2015, Paris hosted the twenty-first United Nations Climate Change Conference (COP-21), where the Paris Agreement established that signatory countries should strive

⁸ U.N. Framework Convention on Climate Change, art. 1, ¶ 2, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992); 1771 U.N.T.S. 107, 168.

⁹ *Id.* at art. 1, ¶ 4.

¹⁰ *Id.* at art. 1 ¶ 5. The Kyoto Protocol to the Convention identifies the following GHG: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF₆). Kyoto Protocol to the United Nations Framework Convention on Climate Change, annex A, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

¹¹ Kyoto Protocol, *supra* note 10, at art. 2 ¶ 1, annex A.

“to limit the temperature increase to 1.5°C above pre-industrial levels,” promoting actions to reduce GHG emissions.¹²

These documents are addressed to the States and establish what goals they should aim to achieve. Even so, the Paris Agreement did not turn a blind eye to the responsibility of economic activities to do their part in accomplishing climate-related goals.¹³ However, despite contributing to the causes of global warming, companies do not have a regulatory framework that binds them to any kind of climate commitment.¹⁴ Corporate commitments to respect human rights have been discussed in the international forum since the 1970s, especially after Latin American countries denounced the domestic interference of transnational corporations before the United Nations.¹⁵ Their message was a warning that the development wave that enabled the entry of foreign investments was accompanied by normative structures that imposed the narrowing of the state regulatory space.¹⁶ In other words, opening avenues to allow foreign investment has led to a diminution in the capacity of States to regulate (and thus protect) their interests and the interests and rights of their citizens.

The most relevant attempt to respond to this gap came from the U.N. Human Rights Council, which in 2011 adopted the *Guiding Principles on Business and Human Rights* (UNGPs), organised into three pillars.¹⁷ The principles set out in the first pillar ratify the international obligation of States to protect human rights from the acts of third parties by adopting legislation and public policies that lead third parties to act with respect for human rights.¹⁸ This obligation does not diminish the obligations of States to respect human rights themselves, to investigate potential violations and, if necessary, to punish aggressors.¹⁹ In addition, the principles clarify that if the third party is an entity created by the State itself, or if it receives public funding, the State has a special duty to be diligent and to take advantage of

¹² Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2, Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 3.

¹³ *E.g.*, *id.* at art. 6 ¶ 4 (describing as a goal of the Agreement to “incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities”).

¹⁴ Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1899 (2021).

¹⁵ The genesis of discussions at the United Nations is attributed to Chilean President Salvador Allende’s speech before the U.N. General Assembly in 1972. For a brief account of the content of his speech, see Robert Alden, *Allende, at U.N., Charges Assault by U.S. Interests*, N.Y. TIMES, Dec. 5, 1972, at 1, <https://timesmachine.nytimes.com/timesmachine/1972/12/05/79482866.pdf>.

¹⁶ *See id.* (quoting President Allende describing international enterprise as “yet another manifestation of imperialism, one that is more subtle, more cunning and terrifyingly effective in preventing us from exercising our rights as a sovereign state”).

¹⁷ UNGPs, *supra* note 1, at iii–iv.

¹⁸ *Id.* at 3–12 (UNGPs 1–10).

¹⁹ *Id.* at 1 (“These Guiding Principles are grounded in recognition of . . . States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms . . .”).

its control over the conduct of these entities to use them as examples of good practices that private individuals should be encouraged to adopt.²⁰

The UNGPs also address companies in the second pillar, establishing that they have a responsibility to respect human rights.²¹ This responsibility does not derive from legislation but from a social expectation that companies adopt conduct consistent with internationally recognised rights.²² Far from setting obligations for business, the principles point to reciprocity: while they extract from individuals and nature what they need to make a profit, they are expected to do so with respect for human rights.²³ The text does not leave this recommendation in the abstract world; on the contrary, it states that companies should act with diligence and genuinely institute human rights due diligence procedures to ensure that they are respected.²⁴ This procedure is designed to allow companies to identify the risks that their activities pose to people (be it the community, clients, employees, or suppliers); assess how they can diminish the chances of violations occurring or prevent them from happening; and how they should respond to unavoidable violations.²⁵

The second pillar develops an important instrument for the discussion we want to have here, what it calls “human rights due diligence.” Having been chosen as the solution to business-related human rights abuses, this innovation’s consequences are not few, as will be explored below. Section II.C explores some of the potential limitations of applying this instrument in the context of human rights violations related to climate change.

Finally, the third pillar of the UNGPs establishes that reparations for human rights violations that occur with the participation of private entities should be made through a set of instruments, whether state judicial, state non-judicial, or non-state.²⁶ To this end, the UNGPs indicate the care that must be taken to ensure that these instruments are more likely to deliver adequate responses to victims.²⁷

²⁰ *Id.* at 4–7, 11 (UNGP 3(d), 4, 10(b)).

²¹ *Id.* at 13–26 (UNGP 11–24).

²² *See id.* at 13–14 (UNGP 12); *see also infra* Section II.B.

²³ *Id.* at 13–15 (UNGP 11, 13–14).

²⁴ *Id.* at 17–24 (UNGP 17–21).

²⁵ *Id.* at 19–26 (UNGP 18–24).

²⁶ *Id.* at 27–35 (UNGP 25–31).

²⁷ *Id.* at 33–35 (UNGP 31, recommending nonjudicial instruments be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning). For a critical analysis of the shortcomings of the criteria established by the UNGPs to measure the effectiveness of non-state mechanisms, see Mark Wielga & James Harrison, *Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil*, 6 BUS. & HUM. RTS. J. 67 (2021).

The UNGPs have proven influential.²⁸ The Organisation for Economic Co-operation and Development (OECD) has updated its Guidelines for Multinational Enterprises to absorb the UNGPs' human rights due diligence instrument;²⁹ several States have internalised the UNGPs through National Action Plans (NAPs);³⁰ and some States have already created or are in the process of creating laws that make the due diligence procedure mandatory for certain corporations.³¹

This set of principles is a voluntary instrument; it does not create obligations for companies until States adopt it domestically to regulate economic activities and establish limits linked to human rights, such as laws to protect consumers, children, the elderly, and workers. These are laws that will impose limits on business conduct in benefit of the protection of these people's rights. From another point of view, this is the recognition that these people have rights. And if there is the recognition of a right, it is necessary that there is a correlate remedy in the case of violation.³²

When a right is violated and damage is caused to a person, the civil law system outlines the burden of proving liability. The configuration of this system varies from one country to another, but in general (i.e., there are exceptions based on the identity of the offender, e.g., the State; or exceptions based on the type of property offended, e.g., the environment), the inquiry is whether there is proof of the existence of the damage; whether there was conduct by the person who is indicated as the offender; and whether there is a nexus between the conduct of the offender and the damage that occurred.³³ If a common law country's legal system is evaluated, other elements can be found, such as the duty of care.³⁴ It is outside the scope of this Essay to explore the differences in liability systems, but it suffices to say that different legal systems each have the necessary instruments to establish who is responsible in the case of an offence to protected rights.

²⁸ See generally Humberto Cantú Rivera *National Action Plans on Business and Human Rights: Progress or Mirage?* 4 BUS. & HUM. RTS J. 213 (2019) (finding that the endorsement of the UNGPs "has given rise to the development of an international ecosystem or constellation of corporate responsibility").

²⁹ Org. for Econ. Co-op. & Dev. [OECD], *OECD Guidelines for Multinational Enterprises* 3, 31 (2011), <http://dx.doi.org/10.1787/9789264115415-en> [hereinafter *OECD Guidelines*].

³⁰ *National Action Plans on Business and Human Rights*, U.N. OFF. HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights> (last visited Feb. 15, 2023); see also *National Action Plans on Business and Human Rights*, DANISH INST. FOR HUM. RTS., <https://globalnaps.org> (last visited Feb. 15, 2023) (providing the current status of NAP development and publication by country).

³¹ *Mandatory Human Rights Due Diligence (mHRDD)*, U.N. OFF. HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd> (last visited Feb. 15, 2023).

³² 3 WILLIAM BLACKSTONE, COMMENTARIES *109 ("For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it's proper redress.").

³³ See, e.g., Lei No. 10.406, de 10 de Janeiro de 2002, Diário Oficial da União [D.O.U.], de 11.01.2002, art. 186 (Braz.); see also *infra* text accompanying note 96.

³⁴ See, e.g., RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (AM. L. INST. 1977).

Therefore, there are, on the one hand, international documents that aim to reduce climate risks and, on the other hand, instruments that establish the role and responsibility of companies for damage to rights. If the impacts on human rights arising from climate change are to be seriously addressed, it is necessary to ask whether this set of instruments presents what is needed to face the problem.

At first glance, the instruments may seem disconnected: instruments that address state activity and that confront climate change, and instruments that dictate the responsibility of companies for impacts on human rights. In fact, there is a deep connection between them.

B. *Relations Between Human Rights and Climate Change*

As climate change is usually associated with impacts on the environment,³⁵ it is important to adequately frame the consequences of climate change in human rights terms. The rights listed by the Universal Declaration of Human Rights³⁶ may be fully impacted. In fact, climate change has environmental consequences that affect human rights insofar as they affect the possibility of maintaining an environment conducive to life. If humans are not guaranteed life on Earth, there is no question of other rights, hence the essentiality of recognizing the existence of a human right to a healthy environment. Although there is no international treaty that recognises a balanced climate as a human right, the United Nations has acknowledged the relationship between climate change and human rights. In July 2019, the U.N. Human Rights Council adopted Resolution 41/21 on Human Rights and Climate Change.³⁷ This document highlights that the effects of climate change have a number of direct and indirect consequences, resulting in the warming of the Earth.³⁸

As a result of global warming, a climatic imbalance is installed that alters precipitation flows and the acidity of the oceans, among other environmental changes.³⁹ Such changes can impede the enjoyment of human rights such as the right to food, clean water, and even life. Further, the resolution recognises that as a result of climate change, the geography of some countries is threatened, which may result in mass domestic and

³⁵ *Causes and Effects of Climate Change*, U.N.: CLIMATE ACTION, <https://www.un.org/en/climatechange/science/causes-effects-climate-change> (outlining the environmental effects of climate change, such as: hotter temperatures, more severe storms, increased droughts, a warming and rising ocean, and loss of species).

³⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

³⁷ Hum. Rts. Council Res. 41/21, *supra* note 6.

³⁸ *Id.* at 2.

³⁹ *See id.* at 4 (referring to the World Meteorological Organization's findings of the rise of sea levels and increased temperatures from global climate change); World Meteorological Org. [WMO], WMO Statement on the State of the Global Climate in 2018, at 16–17, 22–23, WMO-No. 1233 (2019).

international migration,⁴⁰ and such migrants are not protected by any international document.⁴¹

Globally active companies develop as internationally integrated entities, yet they are not subject to a single regulator.⁴² Although they contribute to the causes of global warming—and are among the largest contributors to GHG emissions⁴³—they are not obliged to assume their own share of responsibility, nor are they held accountable for the human rights consequences and impacts of climate change. The absence of a binding instrument that determines standards of action with respect to human and environmental rights allows these non-state actors to be major violators of these rights without being penalised for it.⁴⁴

The voluntary nature of the UNGPs is an important factor to bring to the discussion table, since companies are not obliged to adopt them and, in a case with global impact like this one, the urgency of the matter requires the joint effort of different actors. The codification of rules based on the UNGPs would be the desirable path, but doing so would present difficulties, such as applying a single binding international instrument to countries with a multitude of existing approaches to companies.⁴⁵

At the United Nations, the relationship between corporate activities and human rights is under the scrutiny of an Open-Ended Intergovernmental Working Group, which is tasked with drafting a treaty on the issue, binding on member states.⁴⁶ However, whether the treaty will address the consequences of corporate climate change is still to be determined, not to mention whether it will be approved and enter into force. The third revised draft includes “the right to a safe, clean, healthy and sustainable

⁴⁰ See Hum. Rts. Council Res. 41/21, *supra* note 6, at 2.

⁴¹ See Rosalía Ibarra Sarlat, *Indeterminación del estatus jurídico del migrante por cambio climático* [Indetermination of Legal Status of the Migrant by Climate Change], 20 ANUARIO MEXICANO DE DERECHO INTERNACIONAL [ANU. MEX. DER. INT'L] 135 (2020).

⁴² JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, at xii (2013).

⁴³ *Climate Change 2007: Mitigation of Climate Change*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC] 449 (2007), https://archive.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4_wg3_full_report.pdf.

⁴⁴ RUGGIE, *supra* note 42, at xv–xvi. John Ruggie recalls that states are pressured by the competition generated between those who host multinational companies and the governments where such companies are based. This influences their capacity for binding rule-making. *Id.* at 62–64.

⁴⁵ Ana Rachel Freitas da Silva & Danielle Anne Pamplona, *Os princípios orientadores das nações unidas sobre empresas e direitos humanos: houve avanço?* [United Nations Guiding Principles on Business and Human Rights: Progress Has Been Made?], in *A SUSTENTABILIDADE DA RELAÇÃO ENTRE EMPRESAS TRANSNACIONAIS E DIREITOS HUMANOS* [THE SUSTAINABILITY OF THE RELATIONSHIP BETWEEN TRANSNATIONAL COMPANIES AND HUMAN RIGHTS] 147 (Marcelo Benacchio ed., 2016) (Braz.).

⁴⁶ Hum. Rts. Council Res. 26/9, U.N. Doc A/HRC/RES/26/9 (July 14, 2014). To learn more about the mandate and reports from the sessions already held, see *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc> (last visited Apr. 15, 2023).

environment” in its definition of human rights abuse and has provided for the inclusion of climate change in the impact assessment in the due diligence measures undertaken by companies.⁴⁷ While the existence of a binding treaty to address the issue has not materialised, it is necessary to seek answers to these urgent demands.

The UNGPs fail to specifically address climate or environmental issues, and environmental law is not expressly included in the core rights protections.⁴⁸ However, they state that to fulfil the responsibility to respect internationally recognised human rights, which includes not violating human rights and addressing any negative impacts that their activities may cause, companies may need to consider additional standards based on the context.⁴⁹

Given the participation of economic activity in the genesis of climate change,⁵⁰ the need for accountability for its consequences on human rights must be recognised. But stating that companies have a role in protecting human rights amid climate change necessarily leads to an important discussion on companies’ capability of preventing and mitigating damages and of adequate remediation when they occur. In other words, it is necessary to inquire whether there are instruments that allow discovery of the risks presented by economic activity and to adequately respond to damage. The next Part explores the UNGPs’ concept of human rights due diligence as the main instrument in the hands of companies with the potential to provide such accountability.

II. HUMAN RIGHTS DUE DILIGENCE

Under the UNGPs, human rights due diligence (HRDD) is a tool for identifying current or potential adverse human rights impacts for which a company may be responsible.⁵¹ Current impacts (those that have already happened) will be subject to remediation according to the third pillar of the UNGPs, which lays out state and non-state remedies that can be used.⁵² If there is no damage, HRDD assists in identifying the risk of potential damage and strategies to mitigate or avoid such damage.⁵³ The UNGPs further provide that corporations, in adopting HRDD, should integrate and

⁴⁷ Hum. Rts. Council, Text of the Third Revised Draft Legally Binding Instrument with Textual Proposals Submitted by States During the Seventh and the Eighth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/52/41/Add.1, at 9–10, 24–25 (Jan. 23, 2023).

⁴⁸ See UNGPs, *supra* note 1, at 1.

⁴⁹ *Id.* at 13–14 (UNGP 12).

⁵⁰ *Climate Change 2007: Mitigation of Climate Change*, *supra* note 43, at 449.

⁵¹ UNGPs, *supra* note 1, at 6–7, 17–24 (UNGP 4, 17–21). For a definition of human rights due diligence, see Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. & HUM. RTS. J. 195, 199 (2017) (“In our view, the standard of due diligence required to be performed by companies is initially defined by a process of risk (or impact) assessment.”).

⁵² See *supra* notes 26–27 and accompanying text.

⁵³ UNGPs, *supra* note 1, at 17–20 (UNGP 17–18).

act upon the findings by tracking responses and communicating how impacts are addressed.⁵⁴

But this language speaks only of human rights harms directly traceable to businesses. Is it possible to also apply such an instrument for damages related to the environment? As mentioned, the UNGPs do not speak of environmental rights protection. If HRDD is a procedure that relates to human rights impacts produced by business activities,⁵⁵ regardless of how they occur, the logical conclusion is that HRDD is applicable upon the fulfilment of one requirement: violation of a human right. Thus, if a human right is violated—for example, the right to housing, to drinking water, or to access to food—because of climate change, and climate change, in turn, occurs because of business activities, it seems acceptable to use HRDD to identify and mitigate damages to human rights caused by climate change.⁵⁶

However, in the existence of human rights impacts, which may or may not be related to climate change, the situation can be referred to the judiciary—with possible compensatory consequences—whenever the status quo ante cannot be restored.⁵⁷ However, even in regimes that have already expressly ruled out the prescription of environmental damage, compensation is not sufficient, and adherence to compensatory schemes should not be prioritised. Regarding the consequences of climate change, its extent and intensity are indicating that it is even more necessary to devote time and study to modes of prevention. Knowing that climate change stems from human action, and that the participation of business activities is part of human action, it is necessary to assess how to compel business activity that can generate such consequences to participate in due diligence procedures. Business activities, especially in liberal regimes, are not easily compelled. Rather, regulations are generally established to ensure their participation.⁵⁸ Therefore, expectations cannot be high for the shaping of climate change–related business activities through due diligence procedures along the lines of the UNGPs and OECD Guidelines, which are entirely voluntary.⁵⁹ It is necessary to assess whether the content of HRDD, as established in the UNGPs, can be useful to address human rights impacts related to climate change.

A. *Requirements of HRDD*

HRDD must be an ongoing process and covers “adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products,

⁵⁴ *Id.* at 20–42 (UNGP 19–21).

⁵⁵ See generally McCorquodale et al., *supra* note 51.

⁵⁶ See generally Chiara Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’*, 6 BUS. & HUM. RTS. J. 93 (2021).

⁵⁷ UNGPs, *supra* note 1, at 27–30 (UNGP 25–26).

⁵⁸ RUGGIE, *supra* note 42, at xxii.

⁵⁹ See *supra* text accompanying note 29 and following note 31.

or services by its business relationships.”⁶⁰ The exact way the HRDD process will be carried out will depend on factors such as “the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.”⁶¹ Further, UNGP 17 provides that the HRDD process covers possible impacts caused by the company’s own activities but should not stop there. Potential risks which may be directly linked to its operations, products, or services by its business relationships should also be analysed.⁶² This places responsibility for looking at the whole chain of operations in the hands of companies. For corporations with long production chains it can be extremely difficult to carry out HRDD processes. Thus, in such cases, it is necessary to prioritise, which requires the corporation to act thoughtfully and identify general areas where the risk of adverse human rights impacts is most significant, whether because of certain suppliers’ or clients’ operating context; the particular operations, products, or services involved; or other relevant considerations.⁶³

All these requirements fit within the human rights due diligence process as proposed by the UNGPs. It is still debatable what due diligence should look like when targeting climate change risks—that is, should it constitute an obligation to produce results; or should it allow for liability regardless of all efforts made during the process?⁶⁴

B. *The Human Rights at Stake*

As the structure of the UNGPs was established in order to address the State’s obligation to protect rights and the responsibility of business to respect them,⁶⁵ one of the first questions that arises is: To which rights are the UNGPs referring? UNGP 12 clarifies that the content of the principles refers to “internationally recognised human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International

⁶⁰ See UNGPs, *supra* note 1, at 17–18 (UNGP 17(a), (c)).

⁶¹ See UNGPs, *supra* note 1, at 18 (UNGP 17(b)). In this way, HRDD procedure shares similarities with the risk analysis processes that companies adopt, but they are not identical insofar as HRDD is concerned with conduct that presents risks to stakeholders outside the company, while risk analysis processes are focused on identifying risks for the company itself. See generally A.K. Jallow et al., *Operational Risk Analysis in Business Processes*, 25 BT TECH. J., Jan. 2007, at 168.

⁶² UNGPs, *supra* note 1, 17–19 (UNGP 17(a)).

⁶³ *Id.* at 18 (UNGP 17 cmt.).

⁶⁴ For a comprehensive debate, see BRITISH INST. OF INT’L & COMPAR. L., HUMAN RIGHTS DUE DILIGENCE FOR CLIMATE CHANGE IMPACTS: WEBINAR SERIES REPORT (Lise Smit & Ivano Alogna eds., 2021), https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf.

⁶⁵ RUGGIE, *supra* note 42, at xxi (summarizing the UNGPs as “states must protect; companies must respect; and those who are harmed must have redress”).

Labour Organization's Declaration on Fundamental Principles and Rights at Work."⁶⁶ The commentary indicates⁶⁷ that

[a]n authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights [ICESCR]),⁶⁸ coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.⁶⁹

Although no one of those instruments will tackle the detrimental consequences derived from climate change, the ICESCR recognises the right to a healthy environment and requires States to improve "all aspects of environmental and industrial hygiene."⁷⁰ In line with this, the U.N. Human Rights Council adopted a resolution recognizing that a clean, healthy, and sustainable environment is a human right.⁷¹ This recognition opens the door to a discussion about the consequences of climate change and state responsibility over them. After all, if there is a right to a clean, healthy, and sustainable environment, and climate change is a consequence of the absence of an environment with these characteristics, there must be protection for its impacts.

C. *The Influence of HRDD in Practice*

The UNGPs influenced the OECD Guidelines for Multinational Enterprises, which in their revision in 2011 included a chapter on human rights and a new approach to due diligence and responsible supply chain management.⁷² According to the general policies in the Guidelines, due diligence helps to avoid causing or contributing to adverse impacts on matters covered by the Guidelines,⁷³ that is, the environment. The

⁶⁶ UNGPs, *supra* note 1, at 13 (UNGP 12).

⁶⁷ *Id.* at 14 (UNGP 12 cmt.).

⁶⁸ G.A. Res. 217A (Dec. 10, 1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Mar. 23, 1976) [hereinafter ICESCR].

⁶⁹ Int'l Lab. Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (2022 ed.) (1998), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf [hereinafter ILO Fundamental Principles].

⁷⁰ ICESCR, *supra* note 68, art. 12(2)(b).

⁷¹ Hum. Rts. Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13 (Oct. 8, 2021).

⁷² *OECD Guidelines*, *supra* note 29, at 31.

⁷³ *Id.* at 19–20.

Guidelines express the need for corporations, over the longer term, not only to disclose information about their GHG emissions but also to develop strategies for their reduction, which is closely connected to climate change impacts. Besides that, the basic premise of the Guidelines is that enterprises “should act as soon as possible, and in a proactive way, to avoid . . . serious or irreversible environmental damages resulting from their activities.”⁷⁴

There is, however, no mention of the impacts generated by climate change. Nevertheless, as the OECD Guidelines show, the UNGPs and their provisions on HRDD are responsible for a broad discussion on the responsibility of companies in relation to negative impacts on human rights and the procedures to be adopted to prevent or mitigate them. Thus, little by little, academics, civil society, and even companies confronted the consequent ineffectiveness of the wholly voluntary UNGPs⁷⁵ and began to argue for the institution of mandatory HRDD procedure and clarification of the conditions of its execution.

Indeed, it can be a challenge to attribute civil liability for the impacts caused by climate change, since, ultimately, those harmed must demonstrate not only a link between a company’s activity and the resulting impact but also that climate change is the cause of the impact and that the defendant corporation has contributed to climate change.

That difficulty may explain why the first laws implementing human rights due diligence were not focused on climate change but rather dealt with specific themes, such as the United Kingdom’s Modern Slavery Act 2015⁷⁶ and the Australian Modern Slavery Bill 2018.⁷⁷

But more recent laws have put into practice the theory that corporate activities that harm the environment meet the criteria for “adverse human rights impact” under UNGP 13.⁷⁸ In 2017, the French Corporate Duty of Vigilance Law, so called because it imposes on corporations a duty to establish a vigilance plan to identify risks and prevent severe impacts on human rights, provided for the companies to be vigilant regarding the

⁷⁴ *Id.* at 46 (2011).

⁷⁵ The Corporate Human Rights Benchmark shows that, although the number of corporations making human rights commitments is growing, thirty six percent of the largest companies subjected to the study scored zero on human rights issues in their supply chains. WORLD BENCHMARKING ALL., CORPORATE HUM. RTS. BENCHMARK 9 (2022), https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf.

⁷⁶ Modern Slavery Act 2015, c. 30 (UK) (consolidating offences relating to trafficking and slavery, and establishing an Anti-Slavery Commissioner).

⁷⁷ *Modern Slavery Act 2018* (Cth) (Austl.) (requiring large entities to report how they are addressing the risks of modern slavery in their operations and supply chains).

⁷⁸ UNGPs, *supra* note 1, at 14 (UNGP 13). For a discussion on what constitutes an “adverse human rights impact” under the UNGPs, see David Birchall, *Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts*, 25 AUSTL. J. HUM. RTS. 428 (2019).

impacts they might produce on the environment.⁷⁹ Additionally, the 2021 German Act on Corporate Due Diligence Obligations in Supply Chains placed enterprises that have their central administration in Germany under the obligation to respect human rights by implementing due diligence obligations.⁸⁰ Under this Act, the core elements of the due diligence obligations include the establishment of a risk management system to identify, prevent, or minimise the risks of human rights violations and damage to the environment.⁸¹ Such obligations apply not only to the corporation's "own business" but also to the actions of a contractual partner or other indirect suppliers⁸²—in other words, to the entire supply chain. The Act further provides for due diligence obligations regarding environmental issues if there is a risk of violating the Minamata Convention on Mercury,⁸³ the Stockholm Convention on Persistent Organic Pollutants,⁸⁴ or the Basel Convention on Hazardous Wastes.⁸⁵ But the Act is silent with respect to unabated risks of climate disaster leading to violations of the rights to food, water, sanitation, and health.⁸⁶

Another recent piece of legislation, the Norwegian Transparency Act, tackles corporate respect for fundamental human rights and decent working conditions in connection with the production of goods and the provision of services.⁸⁷ It stands out for ensuring the general public's access to information regarding how corporations address adverse impacts on fundamental human rights and decent working conditions.⁸⁸ It applies to companies that meet at least two of the following three criteria: total assets of 20 million euros, net turnover of 40 million euros, or an average number of at least 250 employees per year.⁸⁹ It relates to rights enshrined in the International Covenant on Economic, Social and Cultural Rights of 1966 and the International Covenant on Civil and Political Rights of 1966 as well as the ILO's core conventions on fundamental principles and rights at

⁷⁹ Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of Parent Companies and Ordering Companies (Corporate Duty of Vigilance Law)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017.

⁸⁰ Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, BGBl I, at 2959.

⁸¹ *Id.* § 3.

⁸² *Id.* § 2, no. 5.

⁸³ Minamata Convention on Mercury, *opened for signature* Oct. 10, 2013, 55 I.L.M. 586 (entered into force Aug. 16, 2017).

⁸⁴ Stockholm Convention on Persistent Organic Pollutants, *opened for signature* May 31, 2001, 2256 U.N.T.S. 119 (entered into force May 17, 2004).

⁸⁵ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force May 5, 1992).

⁸⁶ Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550, 554 (2021).

⁸⁷ *Id.* at 552–54; Åpenhetsloven [Transparency Act], LOV-2021-06-18-99, July 1, 2022.

⁸⁸ Krajewski et al., *supra* note 86, at 552–54.

⁸⁹ *Id.* at 553.

work.⁹⁰ There is no direct mention of environmental due diligence, but “the government noted that the law will be evaluated at a later stage and that environmental due diligence requirements in future EU regulations would also require changes to Norwegian legislation.”⁹¹

When legislation provides for due diligence to identify environmental risks, it is not necessarily referring to climate change risks. The difference is relevant: environmental risks may pollute water or air, for example, while climate change risks stand to (at least partially) provoke climate change. The German due diligence law, for example, provides for companies to conduct annual risk analyses to identify risks within their own business operations and then take appropriate preventative measures, including “appropriate procurement strategies and purchasing practices, training in relevant business areas, risk-based control measures and contractual assurances from a direct supplier to comply with the company’s human rights and environmental expectations and to address them throughout the supply chain.”⁹² Climate change imposes a high threshold for corporations to identify the risks their activities represent: they can prioritise the issues they find by the severity of their human rights impact, but understanding the risk an activity represents in terms of the possibility of climate damage implies requiring knowledge that will not be gained through meetings with stakeholders usually used for risk identification.

Therefore, there is a need to trust in climate science and integrate the data it has produced into the due diligence process. The research can connect different economic activities with the change in climate and better identify how responsible a specific corporation can be for climate change.⁹³ Climate science not only can—but is also crucial to—providing data needed for the first step of a due diligence procedure: anticipating and assessing potential risks.

From that point, the company will have to deal with the issue of how to handle the risk. Beyond the difference between risks to the environment and risks to the climate, the fact remains that no legislation has fully adopted the UNGPs’ due diligence procedures, and some of the issues still have no answer. For example, the UNGPs have a requirement for potential victims to be heard during the process.⁹⁴ When faced with a risk to the environment, it is possible to identify potential victims along the river that may be polluted by corporate activity. If we are facing air pollution, it becomes a little more complex to identify and hear the victims. But when we face the

⁹⁰ ICESCR, *supra* note 68; ICCPR, *supra* note 68; ILO Fundamental Principles, *supra* note 69.

⁹¹ Krajewski et al., *supra* note 86, at 554.

⁹² *Id.* at 555.

⁹³ See generally DANIELLE DE ANDRADE MOREIRA, LITIGÂNCIA CLIMÁTICA NO BRASIL: ARGUMENTOS JURÍDICOS PARA A INSERÇÃO DA VARIÁVEL CLIMÁTICA NO LICENCIAMENTO AMBIENTAL [CLIMATE LITIGATION IN BRAZIL: LEGAL ARGUMENTS FOR INCLUDING THE CLIMATE VARIABLE IN ENVIRONMENTAL LICENSING] (2021).

⁹⁴ UNGPs, *supra* note 1, at 19–20 (UNGP 18).

consequences of climate change, corporate conduct physically distant from potential victims creates a complexity that still needs to be addressed.

D. *Brazil's Approach to HRDD*

Brazil has not issued legislation on due diligence. Nevertheless, there are instruments that resemble HRDD and can be applied to help fill in procedural gaps to ensure environmental protection. Environmental law proposes the principle of prevention to characterise the responsibility of companies to mitigate their contribution to the causes of climate change;⁹⁵ for the same purpose, civil law offers open concepts such as social function and illicit act.⁹⁶ These legal mechanisms try to regulate lawful conduct—business activities, for example—which may or may not be attributed an unlawful result—environmental damage through illicit deforestation, for example. It is precisely the possibility of producing an illicit result that causes these conducts to be regulated. If there is certainty about the occurrence of damage, the principle of prevention must be observed and measures to mitigate it must be adopted. Thus, when thinking about the environment as a protected legal good, the obligation to maintain areas of native forest is a measure of prevention of the impacts of deforestation. If, however, there is uncertainty about the occurrence of damage, the precautionary principle must be applied, and the risk of damage must be avoided. Note that the human rights due diligence process provides for both possibilities.

In relation to environmental goods, the closest tool in the Brazilian legal system to due diligence is Environmental Impact Assessment (EIA), which requires business activities to account for greenhouse gases because they are sources of adverse environmental impacts.⁹⁷ Human rights due diligence is a broader tool that can be adjusted and applied to identification of harm caused by corporations through their contribution to climate change.⁹⁸ These and other tools make it possible to have a discussion about climate change, its consequences, and who is to bear responsibility over them. However, these tools do not preclude individuals from seeking judicial intervention to

⁹⁵ See, e.g., U.N. Framework Convention on Climate Change, *supra* note 8, at art. 2. (“The ultimate objective of this Convention and any related legal instruments . . . is to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”).

⁹⁶ Lei No. 10.406, de 10 de Janeiro de 2002, Diário Oficial da União [D.O.U.], de 11.01.2002, art. 186 (Braz.) (“Whoever, by voluntary action or omission, negligence or imprudence, violates a right and causes damage to another, even if exclusively moral, commits an illicit act.”); *id.* at art. 187 (“The holder of a right that, in exercising it, manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good morals, also commits an illicit act.”).

⁹⁷ Danielle de Andrade Moreira & Stela Luz Andreatta Herschmann, *The Awakening of Climate Litigation in Brazil: Strategies Based on the Existing Legal Toolkit*, 59 DIREITO, ESTADO E SOCIEDADE 172, 180 (2021).

⁹⁸ Macchi, *supra* note 56, at 93–94.

prevent harm from occurring⁹⁹ or from seeking redress in the courts whenever preventive measures have not had the desired effect and damage occurs.¹⁰⁰ Part III assesses the availability of judicial remedies of reparation for damages resulting from climate change.

III. CLIMATE LITIGATION AS A RESPONSE TO THE CRISIS AND THE DEBATES INVOLVING COMPANIES

Climate issues have been gaining space and importance in the discussion about the preservation of human and socio-environmental rights. However, the actions of the state legislator and administrator have not been sufficient to respond to the urgency of the matter. Thus, the judiciary has emerged as an ally in climate disputes concerning the enforcement of internal and international environmental norms by initiative of public and private entities.¹⁰¹ Among the issues that can be discussed in such litigation to repair the damage caused by climate change is determining corporate liability, compelling companies to adopt preventive measures (as discussed in Part II), and legal liability.¹⁰² Climate litigation consists of “cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change,” excluding cases in which the climate discussion is incidental or the main thesis is not based on climate theories.¹⁰³

In Brazil, the theme of corporate liability in climate disputes has not yet been fully explored, but the reasoning behind recent lawsuits related to climate change is worthy of attention. These cases have focused on the State’s responsibility in enforcing or regulating climate laws.¹⁰⁴ Given the significant corporate contribution to climate impacts, as well as the absence of rules regulating corporations’ actions, litigation has attempted to make

⁹⁹ For example, in France, a suit against oil corporation Total where the plaintiffs claim that the corporation, under French law, should identify the risks its activity represents for climate change and adopt measures to reduce its emissions. Aline Robert, *Oil Giant Total Sued for “Climate Inaction” in France’s First Climate Case*, EURACTIV (Jan. 28, 2020), <https://www.euractiv.com/section/climate-environment/news/oil-giant-total-sued-for-climate-inaction-in-frances-first-climate-case/>.

¹⁰⁰ See, for example, in another prominent European case, the suit against the German company RWE. Roda Verheyen et al., *RWE Lawsuit: First Test Case in Europe to Clarify Responsibilities of Carbon Majors for Climate Change*, BUS. & HUM. RTS. RES. CTR. (Nov. 5, 2018), <https://www.business-humanrights.org/en/rwe-lawsuit-first-test-case-in-europe-to-clarify-responsibilities-of-carbon-majors-for-climate-change>.

¹⁰¹ See generally United Nations Environment Programme [UNEP], *Global Climate Litigation Report: 2020 Status Review*, U.N. Doc. DEL/2333/NA (Jan. 26, 2021), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf>.

¹⁰² *Id.* at 22–23.

¹⁰³ *Id.* at 6.

¹⁰⁴ Fourteen lawsuits were filed against private actors in the Supreme Federal Court (STF) by the end of 2022, according to an online database. *Plataforma de Litigância Climática no Brasil [Climate Litigation Platform in Brazil]*, JUMA, <https://www.litiganciaticlimatica.juma.nima.puc-rio.br/listagem/visualizar> (last visited May 19, 2023).

companies assume the costs of prevention and adaptation as well as responsibility for the damage caused.¹⁰⁵

Climate litigation in Brazil is conducted under one of two strategic prisms to link corporate action to the damage done by climate change. The litigation strategy is either: (1) identify the responsibility to *mitigate* the contribution to the causes of climate change, based on a duty of care and diligence; or (2) identify civil liability, with the determination to *repair* the damage caused by climate change, recognizing the causal link between climate impacts and the contribution of business activity to the intensification of global warming.

A. *Mitigation Litigation: The Principles of Prevention and Precaution*

The Brazilian environmental civil liability regime is friendly to climate litigation, since a balanced environment is a fundamental right and must be protected in the interest of present and future generations.¹⁰⁶ It foresees, among other possibilities,¹⁰⁷ strict liability (applicable regardless of fault on the part of the polluter);¹⁰⁸ full risk liability (arising from developments in scholarship and case law);¹⁰⁹ and a “broad concept of environmental damage: the reparation (or compensation) of the environmental damage must cover not only the ecological damage per se, but also related cultural, social, and economic aspects.”¹¹⁰

In 2021, Brazil had about 50 such climate cases moving through the courts,¹¹¹ but in 2020 the issue reached the Supreme Federal Court (STF), with the receipt of Argument of Breach of Fundamental Precept (ADPF) 708, which involved the governmental management of the National Fund for Climate Change.¹¹² This lawsuit was a landmark case because it was the first to debate the issue in the country’s high court and because, in its judgment

¹⁰⁵ Daniel Iglesias Marquéz. *Empresas, derechos humanos y el régimen internacional del cambio climático: la configuración de las obligaciones climáticas para las empresas* [Businesses, Human Rights and the International Climate Change Regime: The Emergence of Climate Obligations for Corporations], 20 ANU. MEX. DER. INT’L 85 (2020).

¹⁰⁶ S.T.F.J., Mandado de segurança No. 22.164-0 São Paulo, Relator: Min. Celso de Mello, 30.10.1995, Diário da Justiça, [D.J.], 17.11.1995, 1155 (Braz.).

¹⁰⁷ For a comprehensive view of all possibilities see Moreira & Herschmann, *supra* note 97, at 181 (2021).

¹⁰⁸ Lei No. 6.938, de 31 de Augusto de 1981, Diário Oficial da União [D.O.U.], de 02.09.1981, art. 14 § 1 (Braz.) (“the polluter is obliged to, regardless of fault, indemnify or recover the damages caused to the environment and to third parties affected by its activity”).

¹⁰⁹ Moreira & Herschmann, *supra* note 97, at 181. (“Whoever creates a risk of damage to the environment and third parties, due to its mere existence, may be held liable if a damage occurs.”).

¹¹⁰ *Id.* at 182.

¹¹¹ JUMA ET AL., BOLETIM DA LITIGÂNCIA CLIMÁTICA NO BRASIL – 2022 [BRAZILIAN CLIMATE LITIGATION BULLETIN – 2002] 2 (Danielle de Andrade Moreira ed., 2022) (Braz.), https://www.juma.nima.puc-rio.br/_files/ugd/a8ae8a_91656c738e2447b3a97f2030d717a7de.pdf.

¹¹² The documents of the case can be viewed on the STF website. ADPF 708, SUPREMO TRIBUNAL FED., <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5951856> (last visited Apr. 20, 2023).

in 2022, the STF declared that the Paris Agreement should be considered a human rights treaty.¹¹³ This approach exposes the relevance of observing environmental issues in general and the consequences of climate change as a situation that impacts human rights.

Reading the cases brought before the STF through the lens of human rights is an innovation that can be exported to other legal systems. Article 225 of the Brazilian Federal Constitution determines that it is the duty of the public authorities and the community to protect the environment,¹¹⁴ from which we can extract a duty of care. Development of the content of this constitutional rule has led to the conclusion that the duty of protection can be fulfilled by adhering to the principles of prevention and precaution. The former is applied when damage is certain, with this certainty coming from scientific knowledge of the situation. Thus, if scientific knowledge indicates that a certain economic activity is responsible for greenhouse gas emission, it is the responsibility of the source of the emission to adopt preventive measures to mitigate the damage caused by climate change.

The precautionary principle, on the other hand, operates when there is no certainty about the risk posed by a given activity. Thus, to be cautious is to take the necessary measures to avoid the risk of damage. These are remedies derived from the constitutional text, though they are not expressly provided for therein. They are instruments that can be used to require companies to act before environmental damage occurs. Likewise, even though they do not expressly mention climate change, these instruments are also perfectly applicable. For instance, the Superior Court of Justice has decided that it is illegal to use the technique of burning straw during the sugar cane harvesting process because it causes negative impacts on the environment and GHG emissions, contributing to climate change.¹¹⁵ Additionally, the court has expressly mentioned the phenomenon of climate change caused by anthropic factors as grounds for imposing fines for illegal burning offences.¹¹⁶

This judicial approach may raise doubts about conduct adopted by corporations to comply with their duty to be cautious or preventive, as explained above in the discussion of due diligence. But constitutional provisions and the Brazilian National Environmental Policy Act¹¹⁷ provide

¹¹³ S.T.F.J., Arguição de descumprimento de preceito fundamental No. 708 Distrito Federal, Relator: Min. Roberto Barroso, 27.09.2022, 194, Diário da Justiça Eletrônico [D.J.e], 28.09.2022 (Braz.); *see also supra* notes 12–13 and accompanying text.

¹¹⁴ CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 225 (Braz.).

¹¹⁵ S.T.J.J. Agravo Regimental [AgRg] nos Embargos de Declaração [EDcl] no Recurso Especial No. 1.094.873 São Paulo, Relator: Min. Humberto Martins, 04.08.2009, 231, Diário da Justiça Eletrônico [D.J.e], 17.08.2009 (Braz.).

¹¹⁶ S.T.J.J. Recurso Especial No. 1.000.731 Rondônia, Relator: Min. Herman Benjamin, 25.08.2009, Diário da Justiça Eletrônico [D.J.e], 08.09.2009 (Braz.).

¹¹⁷ Lei No. 6.938, de 31 de Agosto de 1981, Diário Oficial da União [D.O.U.], de 02.09.1981, art. 14 (Braz.).

grounds and guidelines for imposing civil liability. Additionally, whenever it is challenging to produce evidence to support a finding of prospective damage, the Brazilian courts apply the principle of *in dubio pro natura*, where it is up to the corporation presenting the potentially dangerous activity to demonstrate that its actions do not pose risks to the environment.¹¹⁸ When one corporation convicted for mercury contamination questioned the inversion of the burden of proof determined by the ordinary courts, the Superior Court found that the nature of the protected legal good (the environment) requires a more incisive and proactive judicial performance to safeguard the interests of the countless users, sometimes including all of humanity and future generations.¹¹⁹

B. *The Impossibility of Reparation in natura*

Regarding the practical results that may arise from such judicial intervention, among the remedies in the civil sphere is the so-called reparation *in natura*, which constitutes “making whole,” that is, restitution of the state prior to the damage.¹²⁰ In the absence of the possibility of this type of reparation, pecuniary compensation is sought. In March 2022, the STF began the trial of the so-called “green agenda,” condensing, for the first time in the country’s history, seven actions involving environmental issues, some of which expressly address climate change.¹²¹ Although these actions were all filed against the State or its agents, it is important to note that judicial responses to environmental issues best address climate change when dealing with prevention. The judicial remedy of reparation comes too late, after the damage has occurred.

For many harms caused by climate change, it is not possible to speak of *in natura* reparation. Once global temperatures rise, as far as scientific knowledge has advanced, it is impossible to revert to the status quo ante. Pecuniary reparation cannot meet the societal interest in preserving a liveable planet, first because of the high cost that it would require and second because of the inefficiency of paying for the destroyed habitat. Furthermore, the loss of people, animals, and biodiversity is incalculable. However, in cases where liability is recognised for a lack of duty of care and prevention,

¹¹⁸ See, e.g., S.T.J.J., Recurso Especial No. 883.656 Rio Grande do Sul, Relator: Min. Herman Benjamin, 09.03.2010, Diário da Justiça Eletrônico [D.J.e], 28.02.2012, 21 (Braz.).

¹¹⁹ *Id.*

¹²⁰ For example, if a car is dented in an accident, one seeks to repair the dent so that the car is in the same condition as it was before the accident.

¹²¹ This can be seen in the agenda published in the Electronic Justice Daily. 37 Diário da Justiça Eletrônico [D.J.e], 24.02.2022, 17–19, available at https://www.stf.jus.br/arquivo/djEletronico/DJE_20220223_037.pdf. By the end of 2022, the STF had concluded four of the seven lawsuits on the agenda, all with environmentally friendly decisions. *Julgamento da ‘Pauta Verde’ no STF é marco de avanços ambientais em 2022* [Judgment of the ‘Green Agenda’ in the STF is a Milestone of Environmental Advances in 2022], WWF (Dec. 22, 2022), <https://www.wwf.org.br/?84500/Julgamento-da-Pauta-Verde-no-STF-e-marco-de-avancos-ambientais-em-2022>.

a reparation obligation—which can be due to moral damage, because of the anguish of individuals under the threat of damage—may be accompanied by orders for the party to adopt conduct that prevents the deepening or amplification of the damage or that addresses the need for resilience measures for those individuals.

Faced with the impossibility of repairing the irreparable, the reparative function of civil liability is depleted.¹²² Thus, in cases that fit this irreparability, one should seek prevention as a principle of civil liability. Climate litigation is thus an impactful method of resisting climate change, especially when used to prevent harm from happening and/or to require companies to assist with resilience measures.

CONCLUSION

Although the importance of finding solutions to climate issues has been recognised and the U.N. has declared impacts of climate change on human rights, the proposition of effective solutions is still incipient. Climate litigation has gained strength in recent years by proposing to put climate solutions into debate using existing rules and regulations as well as aiming to enforce commitments made by governments and even companies. Adopting the conclusions of science and admitting that the climate change we face today is anthropogenic, and that economic activities participate in its occurrence, is already a first and crucial step in addressing the problem.

The prevention of climate damage can be accomplished through the use of the human rights due diligence instrument provided for in the UNGPs. The existing regulations that implement HRDD do not cover climate change and are not clear on how to face the difficulties this phenomenon imposes. It is still necessary to determine how to perform due diligence that can identify and mitigate the risks that a particular business activity poses to worsening climate change and how to include different stakeholders in the process. This procedure, therefore, offers a promising foundation but needs further adjustments in specific climate-related contexts to be efficient. The regulations that exist today leave open these procedural questions, but this does not preclude the interpretation of international bodies or domestic courts from answering them. Hence, the relevance of climate litigation.

Today, litigation filed against companies has a different scope from that filed against public agents, since companies usually do not have rules that bind them to climate commitments. However, it is worth discussing, from the viewpoint of human rights protection, the responsibility of companies to engage in conduct that prevents damage resulting from their activities' contribution to climate change, as well as their duty to mitigate and pay for existing damage.

¹²² TEREZA ANCONA LOPES, PRINCÍPIO DA PRECAUÇÃO E EVOLUÇÃO DA RESPONSABILIDADE CIVIL [PRECAUTIONARY PRINCIPLE AND EVOLUTION OF CIVIL LIABILITY] 121 (2010) (Braz.).

In Brazil, there is fertile ground to impose an obligation to prevent damage resulting from climate change because this equals human rights protection. Given that the ultimate goal must be to maintain life on Earth, the adoption of corporate conduct that deepens problems that potentially lead to death and the destruction of rights must be rejected.