



UNIVERSITY OF GOTHENBURG

**Demanding justice-**  
**Corporate responsibility for Climate Change impacts on Human Rights**

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## Acknowledgment

‘I am no longer accepting the things I cannot change. I am changing the things I cannot accept.’ -

Angela Y. Davis

I am thanking those who stand up to fight fights bigger than themselves, fighting them for all of us.

## Abbreviations

CBDR *Common But Differentiated Responsibilities*

GHG *Greenhouse Gas*

GP *Guiding Principles*

HRBA *Human Rights-based approach*

HRC *Human Rights Council*

IPCC *Intergovernmental Panel on Climate Change*

NAP *National Action Plan*

NGO *Non-governmental Organization*

OECD *Organization for Economic Co-operation and Development*

PA *Paris Agreement*

PIK *Potsdam Institute for Climate Impact Research*

PPP *Polluter- Pays- Principle*

QDA *Qualitative Document Analysis*

RWE *Rheinisch-Westfälisches Elektrizitätswerk AG*

SIDS *Small Island Development States*

UN *United Nations, United Nations*

UNESCO *United Nations Educational, Scientific and Cultural Organization*

UNEP *United Nations Environment Programme*

UNFCCC *United Nations Framework Convention on Climate Change*

UNGP *United Nations Guiding Principles on Business and Human Rights*

## Abstract

Climate change is one of the most complex challenges of our time, as its consequences are reflected in a variety of social and political areas that are interlinked. The problem of 'climate change' has evolved from an environmental problem, to a political issue and, ultimately to an object of jurisprudence. This process consequently entails a change in the relevant and actors involved therein. The relationships between, on the one hand, companies on climate change and, on the other, climate change on human rights are clear and largely undisputed. This paper deals with the opportunities and challenges to transform this causal chain into a command for corporations to assume environmental responsibility.

The thesis aims to understand *how fossil fuel companies can be held accountable for their impact on human rights violations through their contribution to climate change*. Investigating: *In what way may the human rights-based approach be applied in order to hold companies accountable for their contribution to climate change*. For a comprehensive analysis of this issue, an integrated approach is necessary, examining the two major relevant UN framework agreements, namely Professor John Knox' Framework Principles on Human Rights and the Environment, and Professor John Ruggie's Guiding Principles on Business and Human Rights (UNGPs), through the lens of climate justice theory. Climate justice theory applies mechanisms of distributive justice under the consideration of global, intergenerational and ecological justice.

The chosen case study 'Saúl v. RWE' describes a 'business and climate change' conflict. The analysis draws on the procedure and results. In order to capture different dimensions as well as to assess convergence of policy and practice. Methodologically, human rights remain at the center of the analysis.

The analysis of the two frameworks shows two main results. First, by focusing on rights infringements through climate change, plaintiffs are given a tool to approach injustices directly and concretely. Second, the obligation of 'due diligence' for companies puts businesses directly into relation with harm done and can therefore be used as supporting the argument of proximity and legal causation.

It is clear that the history of climate lawsuits is evolving rapidly and comprehensively. Individual victims, as well as alliances of people and whole states go to court to enforce climate justice. Enforcing climate justice is well received by large parts of the population worldwide and receives great legal support. In general, cases are increasingly successful in representing the causal context of climate change impact on human rights, as will be shown in Saúl's case as well. On a normative basis, assumption of responsibility on the part of companies is increasingly demanded and the legal way to claim it is given, however, this way must now be taken.

## 1. Introduction

Climate change is one of the most complex challenges of our time, as its consequences are reflected in a variety of social and political areas. The problem of climate change has evolved from purely environmental problem to a political issue to ultimately become an object of jurisprudence. This development consequently entails a change in the relevant and involved actors.

The mere analysis of the natural environmental climate change phenomena lies within the scope of the natural sciences. As a result of this, and because of the increased understanding of its consequences for society, climate change has become a political issue to be addressed at international, national and regional levels. Governments are thus key players in the task of governing the consequences of climate change. In recent times an increasing number of individuals have attempted to sue for compensation. More and more people are affected by climate change induced hazards and demand reparations on a personal level. Included in this demand is the necessary condition that more effective and faster action on the part of governments and the international community, as well as of private sector players is met (UNEP 2017).

The scientific understanding continues to form the basis of political and legal argumentation about climate change. At the same time, however, there has been a great development in the recognition of the rights' violation of individuals and groups broadening the basis for complaints. This recognition is anchored internationally in United Nation (UN) resolutions that state climate change and its implications to both, directly and indirectly negatively impact on human rights (Knox 2013b).

In addition, and presumably driven by the perceived slowness of climate policy development, people are increasingly looking for other ways to counter the negative effects of climate change. The number of climate claims has increased rapidly, totaling about 850 cases since the world's first lawsuit in 1994 (Nachmany et al. 2017, 13). These complaints have been filed against governments and private companies. The latter being said to neglect their responsibilities regarding the environmental impact, while also pointing out their overall enormous contribution to global warming (Heede 2014).

The landscape of lawsuits has so far been rather confusing; many cases are not even admitted to court and all apply only to their respective national jurisdictions (UNEP 2017, 31). This makes the universal application of human rights rather difficult.

In the field of international relations, this problem of lacking cooperation is predominant. In development theory, the human rights-based approach has been applied. Given the similarity both issues face, it may be fruitful to assess the Human Rights-based approach (HRBA) in the context of climate change. Therefore, I will examine whether the human rights-based approach could be a suitable way of countering climate litigations and ultimately achieving climate justice.

### 1.1 Relevance for Global Studies

Anthropogenic climate change is the result of resource overuse, due to, inter alia, accelerated globalization processes (Chang 2013). Climate change is primarily to be seen as a phenomenon of the stages of human development that lead from industrialization to today's 'anthropocene' era and represent the violent and often irreversible influence on the earth. The now flaring phenomenon of climate change litigations indicates the inadequate handling of climate justice and means that governance mechanisms must be developed and interpreted in the sense of a social and ecological balance (Duraiappah et al. 2014). Global Studies covers the range of influencing factors and the interdisciplinary analysis of solution approaches. As final thesis of the 'Global Studies' program, the work is embedded in the multi-layered study of globalization and its multi-faceted effects. Climate change's human dimension, namely the affects and impacts on all factors related to society, requires international corporation and global strategies, hence posing a topic of relevance for global studies par excellence.

### 1.2 Delimitations

This study depicts a snapshot in climate justice history, outlining and examining the current situation of corporate responsibility regarding rights violations through climate change. The analysis of international policy frameworks and their possible application to climate litigation leaves out the discussion of international rights enforceability and global governance.

Due to the aim of my study, to investigate the applicability of the human rights-based approach, I focus on UN agreements and thus international guidelines, leaving out national action plans (NAP) for human rights action. Despite the importance of those national goals on human rights performance, the climate justice perspective leads me to focus on the inclusion of all, and hence an international perspective.

## 2. Literature

### 2.1 Previous research and Research gap

Climate change is caused to varying extent by every single person living on Earth. The question of responsibility is therefore complex. Previous research in the field of environmental justice, however, emphasizes the great differences in the contribution to the problem of climate change (Moellendorf 2012, 132). While Western nations have been using large amounts of natural resources since (at least) the Industrial Revolution, many states in the global South have a markedly low carbon footprint. Yet it is precisely these nations of the global south that are most vulnerable to the consequences of climate change, which displays a large mismatch in burden-sharing (Kreft, Eckstein, and Melchior 2017). Because of this imbalance, mechanisms for regulation have been developed. The 'Polluter-Pays-Principle' (PPP) is supposed to demand redress and compensation from the very states that contribute to pollution. The 'Common But Differentiated Responsibilities' (CBDR), anchored in the Paris Agreement (PA), recognizes climate change as a 'collective action' issue, which requires each state to make its contribution, but at the same time also indicates that responsibility derives from both contribution to the problem and capacity and ability to act (United Nations 2015).

Climate justice theory combines global, intergenerational and ecological justice and poses questions of rights and obligations within the framework of this theory. The human rights on which the human rights approach is based represent a way of implementing rights and obligations. This paper analyses whether and to what extent this application is purposeful from the point of view of climate justice.

Literature and concepts discuss the significance of responsibility for climate change as a normative concept and apply them to nation states and individuals (see Caney, Shue, Vanderheiden). The distribution and allocation of CO2 certificates is one tool, which is found in international agreements, such as the Paris Agreement. However, businesses have not yet been extensively included into those discussions. There is a legal framing of responsibilities for the ensuring of human rights, a context in which business actors have only recently been involved in. Lastly, the intersection of climate change, business and human rights has not been explored extensively. Hence, the following thesis will investigate on precisely this thematical overlap.



## 2.2 Aim and Research Question

The thesis aims to understand *how fossil fuel companies can be held accountable for their impact on human rights violations through climate change contribution*. Investigating; *In what way may the human rights-based approach be applied in order to hold companies accountable for their contribution to climate change*.

First, it will be shown which rights are acknowledged to be violated by climate change and which actors, here with a focus on fossil fuel companies, make a significant contribution. The work presents the causal chain of greenhouse gas emissions and climate change, and refers here to recent jurisprudence, which recognizes the linking, not only on a global level, but also broken down to the contributions made by individual actors and ascribes responsibility to them (Higher Regional Court of Hamm 2017; 2. Zivilkammer des Landgerichts 2016). Since climate change is a global problem and a cross-border challenge, one could argue that a universal approach and international jurisprudence would be appropriate. This is the starting point for the analysis of current court cases (presented is one case study) and the question of whether improvement could be achieved through the usage of universally applicable human rights and their values and principles.

Human rights as such have since their adoption been complemented by UN-frameworks and conventions in order to clarify the practical application of rights and obligations, which is why the frameworks of ‘human rights and climate change’ and ‘business and human rights’ are analyzed in this work.

The UN-framework agreements are hence investigated from a climate justice perspective, leading to a statement on the resulting, concrete responsibility of fossil fuel companies.

Within the scope of the research, I investigate the responsibility of fossil fuel energy companies in relation to human rights violations. It is shown which rights’ violations are recognized in relation to climate change and which responsibilities are formulated for business players.

*RQ: In what way may the human rights-based approach be applied in order to hold companies accountable for their contribution to climate change induced rights violations?*

## 3. Theoretical framework

Climate change in a nutshell is caused by the excessive emission of greenhouse gases and thus ultimately by the overuse of the earth's atmosphere. As theorists have outlined, climate change poses a multitude of complex and intertwined issues (Caney 2016; Odenbaugh 2007; S. M.

Gardiner 2010). Without going into the scientific context of climate change in detail at this point, the explanation is relatively simple. The earth provides natural so-called 'carbon sinks' in the form of atmosphere, forests and oceans. These can absorb GHG so that an environmental situation is maintained in which humans, animals and plants can survive and thrive. If GHG emissions exceed this 'atmospheric capacity', climatic change will occur, as we are currently experiencing (Vanderheiden 2008, 46).

From a human perspective, it is therefore virtually uncontroversial that such changes must be contained or prevented in order to continue to protect and preserve human life on earth. In concrete terms, this means that the use of resources and GHG-capacity must be governed and controlled politically. How much GHG can be emitted, and by whom and who is responsible for compliance and, if necessary, punishment in case of non-compliance? Different perspectives can be taken in answering these questions. This paper takes the perspective of climate justice. Other approaches are for example more economically centered and follow cost-benefit analyses (Duraiappah et al. 2014, 96), (for further sources see e.g. N. Stern, W. Nordhaus) or consider the changes from a non-human-perspective focusing on the rights of animals or even ecosystems and the earth as such (see Palmer 2011).

### 3.1 Climate Justice Theory

For the analysis of this work I am using a theoretical framework of climate justice. Climate justice theory allows to investigate the ethical dimension of climate change, as it includes three components of justice; namely *global*, *intergenerational* and *ecological* aspects (S. M. Gardiner 2006).

Distribution and questions of distributive justice in the context of climate change are subject to a multi-level complexity. Although the practical solution to the problem of excessive emissions is a simple one, namely mitigation, the way thereto is not quite so obvious, posing challenges of procedural justice. The theory of climate justice, however, attempts to find a justifiable and fair solution by incorporating the three elements mentioned above.

In the following I present the theory by showing the effects of the problem of 'climate change' on the one hand and how possible solutions are assessed from a justice perspective on the other hand.

#### The *Global* aspect

It is well known that climate change is a global problem, which means that on the one hand it is caused by the accumulated emission of GHGs worldwide. No actor could have caused the problem

alone. At the same time, the consequences of locally emitted emissions are felt globally, but cannot be attributed to the emitter. It is also known, firstly, that the negative effects are everywhere felt to varying degrees of severity and, secondly, that share of participation in causation is not the same (Martinez-Alier et al. 2016). The links between environmental issues and socio-economic positioning of the affected people, emphasizes that climate change functions as an accelerator of other issues of unequal distribution. This represents the underlying and earlier conceptualization of relating environmental concern to social injustice, where climate change is regarded as an outgrowth of social inequity (Schlosberg 2013, 46). Originally, primarily a victim perspective was taken, accounting for unequal vulnerabilities to climate change effects.

Climate justice theorists integrate these aspects through the following principles. Historically unequal emissions are taken into account in the 'Polluter-Pays Principle'. This means that those states which in the past emitted more GHG than others must now also reduce their share of emission more (Baer 2007, 248). This principle is based on the assumption that the prosperity of industrial nations can be traced back to the use of a (theoretically) common and globally possessed atmosphere. Based on this logic, the reduction requirement is thus also 'fair' (Shue 1993, 52).

Another approach that is intended to distribute emission rights at the global level is the 'Equal Per Capita' approach. Here, all emissions must take place within a non-negotiable space of environmental safety.<sup>1</sup> This quantity would have to be allocated amongst all people thus posing questions of distributive justice. On the positive side, it appears quite obvious on how to deal with this issue regarding operation mechanisms. Scholars in the field of environmental justice, as well as fundamental philosophy, mostly agree on equal per capita distribution as the instrument of choice, satisfying basic rights (Caney, 2012, 259), (Singer 2002, 35). Moreover, this approach guarantees the keeping of the environment within a safe space. On the negative side, however, two major problems arise, namely implementation difficulties and a potential violation of basic human rights. equal per capita distribution of a CO<sub>2</sub> budget would neglect individual needs and preferences and thus cause 'soft' violations of rights, supposed that basic rights are still ensured. The distribution of emission rights equal per capital might create equality but not equity. I want to argue that the application of this approach is prone to manifest existing inequalities by disregarding capabilities and instead simply dividing resources.

#### The *intergenerational* aspect

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<sup>1</sup> I.e. 350 ppm as used in the widely acknowledged IPCC reports (IPCC 2007).

Another relevant aspect is the one of intergenerational justice. Both, the consequences of climate change as well as the consequences of mitigation or lack of mitigation influence not only present but also future generations. Climate justice therefore incorporates 'intergenerational justice' into its theories and deals with issues such as the duty to protect future generations and the weighting of rights of present and future generations. The already mentioned mechanism of 'historical debt' therefore plays a role not only 'across scope' (Page 2007, 17), but also 'across time' (Odenbaugh 2010), (Caney and Bell 2017). In a carbon-based society like ours, today's prosperity is mostly based on the exploitation of resources (Schlosberg 2001, 5). Nevertheless, it is well known that overexploitation, if continued in this way, makes the earth an inhospitable place. Therefore, today's decisions about resource use can have both positive and negative impacts. The use of ecosystem services is a good example to illustrate the complexity of this tradeoff. While, on the one hand, the use of raw materials and ecosystems is beneficial to the economy and thus in the best case to society, excessive exploitation leads to irreversible damage that then reduces the quality of life (Caney 2007), (Caney 2011, 8ff). At the same time, there is a theoretical danger of threatening the fundamental rights of currently living people if too drastic or not well-placed mitigation is practiced.

#### The *ecological* aspect

The aspect of ecology or environment refers to the discussion as to whether non-human actors can or should also be attributed rights. After the above discussion on whether future generations already possess rights that need to be protected, the discussion on whether other actors, i.e. animals and ecosystems, are right holders follows. These should be recognized and defended from a post-human perspective (Braun 2004, 272–73). But ecology also finds its place in human-centered climate justice. Here mostly as an ecosystem service and thus the value for human life attributed to a functioning environment (Hediger 2006, 361). Ecosystem services are the benefits gained from functioning ecosystems, such as climatic regulation, hydrological cycle, pollination etc.

In the above-mentioned aspects, I present the elements of climate justice theories, and argue that the comprehensive character is particularly useful for the analysis of the question of this paper. Nevertheless, gaps must also be identified. First, I agree with Iris Young's (a political theorist from Chicago University who is focusing on the nature of justice), critique of the excessive focus on

distributive justice. She criticizes that climate and environmental justice<sup>2</sup> should be placed in a broader context than the mere distribution of resources (Young 1990, 9). Unequal and maldistribution are stated as a consequence of social structure and norm, which is why, as a consequence, the structure of institutions should flow into the theories of climate and environmental justice (Young 1990, 12). This systemic marginalization of population groups and execution of power is, in theory, prevented in the human rights agenda. Therefore, I argue that a human rights approach complies with the mentioned point of criticism and, at least theoretically, with the elements of participation and co-determination. Furthermore, the theory of climate justice initially deals little with the question of agency; which actors are involved in the implementation of rights? However, since this question is of enormous importance for the present work, the theory is extended by these aspects and tested for real-world implementation. Concludingly, I chose the theory of climate justice as I think it is most suitable for the purpose of this research for the following reasons. Foremost, it includes the many aspects of the human dimension of climate change, such as distribution, power relations, cross-generational and ecological concerns (Moore 1999, 295). Where other governance theories focus on states (or supra-national associations of states), climate justice theory is concerned with power distribution in a wider sense. This benefits me, allowing the investigation of power structures of non-state actors through the application of normative justice schemes onto those.

Some might see a shortcoming in such normative theories, with its lack of implementation guidance or instruments. Economic theories that are concerned with the distribution of emission permits are more concrete here, however, I want to argue to the use of climate justice here, because it approaches climate change induced issues with a roots-based perspective. The investigation is framed by questions of fairness and equity in a rather pure sense. Feasibility of outlined mechanisms can then be discussed at a later stage. Yet, normative theory allows the construction of concepts and approaches, in a setting that leaves out the question of applicability at first (Loureiro 2015).

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<sup>2</sup> The term 'climate justice' is far newer than that of 'environmental justice', in the context of this explanation the terms can be used synonymously, since it is first about the governance and management of resources.

## 4. Method

My research aims to investigate in what way a human rights-based approach can pose an adequate way to achieve climate justice from non-state actors, particularly fossil fuel companies. Such questions addressing normative concepts of society (i.e. human rights) lie within the field of normative political theory, common instruments to approach normative questions is theoretical analysis (List and Valentini 2008, 1).

In order to approach my research question, I used a multimethod approach with document analysis of the chosen UN-frameworks and conducted a case-study of an ongoing lawsuit, following the principles of climate justice theory.

In order to analyze the role of companies' responsibility, I apply the key aspects of climate justice (global, intergenerational and ecological justice) which I already outlined previously above. I then assess two UN-frameworks and show how they address the issues of climate change and human rights and business and human rights respectively. This being done, I apply the findings onto a lawsuit.

The frameworks and guidelines thus represent the position of the UN member states on the respective topics. Professor John H. Knox<sup>3</sup> and Professor John G. Ruggie<sup>4</sup> in their corresponding roles as special rapporteurs for the UN offer guidelines or frameworks, giving extensive summaries of existing human rights law and policy regarding the respective topics. The analysis thus evaluates the documents with regard to their compliance with the criteria and definitions of climate justice. I used the method of document analysis, a systematic review method, commonly applied in qualitative research (Bowen 2009, 27). Desk-based research and critical review of secondary literature has been conducted in addition to the study of the framework documents. The analysis of the UN documents enabled a comprehensive understanding of the 'status quo', i.e. the political and legal situation of climate change human rights companies. The case study was then embedded in this context. Such a mixed-method approach is common in qualitative research (Bowen 2009, 29).

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<sup>3</sup> Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment between 2012 and 2018.

<sup>4</sup> UN Special Representative on business & human rights since 2005.

The analyzed topic lies at the intersection of three issues or actors; Human Rights, Climate Change and Business and is foremost concerned with a question of normative justice. For the answering of my research question, I chose to start out with an isolated analysis of the respective relations, investigating the direct impact climate change and business have on human rights respectively. *How is climate change viewed from a human rights perspective? How is business action viewed from a human rights perspective?* The third part of the analysis then allows for the examination of the interlinked relation and indirect impact on human rights. *How are businesses held accountable for their contribution to climate change and consequential subsequent impact on human rights?*

#### The case Study

As my case study I selected a court case of a Peruvian Farmer ‘Saúl’ against a German energy company ‘RWE’. The case is on-going, however, it is the first time, a court has acknowledged a private company’s shared responsibility in causing climate damages (Mechler et al. 2019, 475). The case deals with the issue of ‘responsibility’ in a legal way and therefore provides a good opportunity to examine whether and how the normative principles of climate justice apply in the legal context. The chosen case allowed me to discuss political concepts of equality and justice and was hence seen fit for the embedding of normative political questions (List and Valentini 2008, 6). Although the case is not yet closed, it has already taken unprecedented steps by being admitted to court and therefore allows an analysis of the previous procedure and the elements of partial responsibility, causality and liability. The case serves as an exemplary illustration of the problematization of the human perspective of climate change and, consequently, of the question of who can be held responsible for bearing the social costs of climate change (Mechler et al. 2019, 480).

The climate lawsuit ‘*Saúl v. RWE*’, indicates the practical application of the three intersecting issues of Human Rights, Climate Change and Business. The Peruvian mountain guide and farmer sues a German energy company due to its immense contribution to climate change and thus threat on his property and life (Germanwatch 2017). The case analysis consisted of studying court documents and rulings, providing an exemplary explanation of climate change litigation against corporations as well as showing the approach with hurdles and successes involved. First, it is shown, which substantive (human) rights and rights principles are violated, as well as the laws and policies referred to. Second, by giving a chronological overview, the significant legal steps of proving justiciability, causality and proximity are indicated and explained. This investigation and

carving out of the legal steps to be taken in a climate lawsuit contributes to the depiction of the legal path towards climate justice.

Hence, the case provides the possibility of visualization and concrete and context-based knowledge enhancement. It increases the understanding of climate litigation procedure and mechanisms applied as opposed to proofing hypotheses or predicting outcome (Flyvbjerg 2006, 223). Rather, by means of a tangible representation of the problem, the case provides the capacity, in the ensuing analysis of the policy framework, to draw attention to decisive aspects. Furthermore, as the context of climate litigation is rather new and its legal and political classification is not yet final, both lawyers and judges as well as social scientists cannot conclude on its outcome. However, during this exploratory phase, single case studies foster the understanding of underlying mechanisms of law and policy and how they are applied thus far (Gerring 2018, 350).

Methodology and theoretical framework of the present work arise from the research question posed and are closely connected to one another. As described above, the case study is the depiction of a concrete case, in order to outline current status and challenges of a litigation, followed by the theoretical categorization of climate justice according to the UN frameworks guiding the issues and actors.

## 5. Analysis

The analysis is based on theory of climate justice and examines within this scope, the applicability of the HRBA to climate change induced rights violations through fossil fuel companies. In order to do so, the analysis is arranged as follows. The first part of the analysis deals with the understanding of human rights. It shows the normative meaning behind them and their potential scope and differentiation from other rights. Then, the analysis becomes more specific dealing with those two frameworks that define the relationship for UN member states between human rights and climate change or business respectively.



## 5.1 Human Rights

### The origin of Human Rights

Human rights today are commonly grouped into different categories, referred to as first, second and third generation: Civil and political rights, economic, social and cultural rights and collective development rights (Macklem 2015, 12). Said categorization leads back to Karel Vasak, former director for Peace and Human Rights at UNESCO. He has developed the three-part division of human rights, according to the three maxims of the French revolution; liberty, equality and fraternity (Vasak 1977, 29).

Liberty rights are reflected in the first generation, comprising 'civil and political' rights, equality in the second generation with 'economic, social and cultural' rights and lastly fraternity in the third the collective-developmental rights (Macklem 2015, 12). Civil and political rights include e.g. the freedom of speech and of religion, so-called negative rights. That is being able to publish without being persecuted. The state grants the right to pursue such action. Economic, social and cultural rights include e.g. the right to food, health care and social security, thus requiring stage setting by the state (Williams 2004, 39). The implementation of all (human) rights depends on the stability of the national or local institutional structure, however, second generation rights are especially related to for instance a state's welfare system and hence its ability to provide care (Macklem 2015, 3). While the first generation of rights emerged mainly from the French and American revolution and has then been enshrined in the Declaration of Human Rights in 1948, the second generation of rights is oftentimes reflected in regional Charters, e.g. the African or European Charter on Human Rights. Third generation rights are yet more reflecting global interdependence. Community, collective and group rights include the right to economic development, to breathe unpolluted air and to live in a harmonious society, none of which can be fulfilled without cooperation in the international community (Williams 2004, 39). These third-generation rights can be interpreted as necessary condition without which humanly decent living is not possible. The third category is least institutionalized, however relevant to the current analysis (Langlois 2015, 15–16). Making these conditions enforceable required state action. Particularly the protection of minorities, which is to be ensured in the 'third generation rights', plays a major role in the case of climate change, as the theory of climate justice is largely based on the elimination of the oppression of marginalized groups, such as indigenous peoples or smallholder farmers in the global South.

Rights are basically only then valid when there are legal institutions to enforce them. Human rights additionally bear strong normative justification.

### The Principles of Human Rights

In the following, I disentangle the concept of human rights, showing procedural and substantive rights, as well as the underlying principles (*empowerment, participation, non-discrimination and equality, accountability and legality*), which are built on normative core values. I consider this step require din order to apply the HRBA.

The human rights-agenda, as defined in the UN HR-Charta, draws on the following principles; *empowerment, participation, non-discrimination and equality, accountability and legality*. They ought to be understood as a framework within which all human activity should occur (OHCHR 2012). The rights-based approach fundamentally builds upon the value system of the human rights-agenda. Its application should allow actors more easily to claim one's rights by providing procedural entry points on one hand and to meet the responsibilities on the other (OHCHR 2010). The principles empowerment and participation indicate that a HRBA cannot be applied top-down. It rather calls for a transparent setting in which all stakeholders can independently assess the situation at hands. Therefore, awareness and (access to) information needs to be facilitated, providing the tools and platform for participation through institutions fostering transparency and accountability. Only then the ability to claim one's rights is guaranteed; participation is thus a right as well as a condition for the approach to be working. Such ideas are also found within the argumentation of climate justice scholars, who point out the importance of inclusion especially of the vulnerable and especially impacted in order to hear their voices and lastly achieve a more just manner of social distribution (Schlosberg and Collins 2014, 361) Non-discrimination and equality are principles especially emphasizing the irrevocable inclusion of all; every human is equal. Third-generation human rights pay special attention to marginalized people, not necessarily by giving them *more* rights but by enabling their access to information and discussion (Cameron 2010, 710). Decision-making processes thus must be transparent and on eye-level, taking all actors into account. Furthermore, accountability and legality require the implementation of monitoring mechanisms as well as the acknowledgment and respect of human rights internationally and in a legally embedded manner. (Scottish Human Rights 2016; UN Human Rights Working Group 2015) With a human rights-approach, these aspects are ensured, giving a reliable base of argumentation for plaintiffs and victims. One could argue that the ongoing development of

increasing number of lawsuits is a way of challenging and expanding the existing boundaries and thus the claiming of these rights. Especially political and environmental organizations support the claim that lawsuits are helpful in challenging boundaries, while other authors also state the low success rate of lawsuits thus far pointing towards the shortcoming in litigation (Monsma 2006, 457).

As already stated, there is an interdependence between the protection of human rights and a healthy environment as well as well-functioning ecosystems: Human rights cannot be met without environmental protection (Duraiappah et al. 2014, 98). Consequently, in order to achieve full human rights enjoyment, environmental rights must be legally enforceable. The human rights principles thus provide a framework to handle conflicting interests, for example human development vs. environmental destruction. At first sight, the ‘Greenhouse Development Rights framework’ may appear adequate to address the conflicts between human and environmental health as it provides a burden-sharing framework based on capacity and responsibility (Baer et al. 2008, 652). The framework considers country’s economic ability to contribute to mitigation and adaptation efforts as well as its historic debt, so in order to quantify a nation’s environmental responsibility. However, critics of such methods allocating costs (and corresponding benefits) fairly argue that actors’ contributions are disregarded entirely. Some critics therefore apposite ‘social distributive justice’ approaches, which focus on individuals only (Ekaradt and Ll 2010, 28). Holistic policies, which include several levels of governance; local, national and international, as well as the empowerment of and cooperation with civil society are more likely to prove long-term effectiveness. This approach enables and attempts to include all members of all societies, especially the marginalized and poor. According to the rights-based approach this ought to reduce inequalities, thus serving both environmental sustainability as well as human development. Considering the above discussion, it becomes clear that the HRBA addresses ‘asymmetries of power’ and lastly stipulates an equitable procedure of tackling CC induced issues improving upon the Greenhouse Development Rights framework and the social distributive justice approach.

## 5.2 Climate Change and Human Rights: The Framework Principles

Having delineated the aspects of the HRBA, I shall analyze two frameworks in that lights. The 1972 Conference on Human Environment report linked human rights enjoyment with environmental protection; *‘man has the right to [...] adequate conditions of life in an environment*

*of a quality that permits a life of dignity and well-being*' (UN Conference on the Human Environment 1972, 4). Henceforward, environmental protection was demanded in order to safeguard the substantive human rights at stake: the right to food, water or health. The 1992 Rio Declaration on Environment and Development declared the significance of procedural rights. Access to information, participation in decision-making processes and access to judicial and administrative proceedings had been regarded as elements of protection in order to foster the advancement of environmental policies (UN Conference on Environment and Development 1992, 3). The following section provides deeper understanding of the integration of environmental policies into the human rights agenda after this first recognition had been stated.

#### Special Rapporteur on Human Rights and the Environment

Special Rapporteurs and Independent Experts are appointed by the UN Human Rights Council (UNHRC) to work on thematic or country-specific issues, sent to explore from an unbiased perspective. Typically, they perform case-studies and include a variety of impacted stakeholders into their fact-finding missions. Knox was the first independent expert on human rights and the environment appointed by the Human Rights Council in 2012, serving a six-year mandate (OHCHR 2018). He was asked to study human rights obligations relating to the enjoyment of a safe, healthy, clean and sustainable environment. Knox is Professor of International Law, with focus on human rights and environmental law and their relationship with one another (International Union for Conservation of Nature 2018). As Special Rapporteur he urged the UN to recognize environmental rights as human rights and developed the novel Framework Principles on Human Rights and the Environment, containing guidelines and state obligations on the issue.

The 'Framework Principles on Human Rights and the Environment' are the latest overarching document summarizing and clarifying the current state of rights' obligations regarding a healthy environment. Until their adoption in January 2018, ten UN resolutions have been approved and various agreements (e.g. UNFCCC) and institutions (e.g. UNEP) have included the topic into their agenda. The core principles of 'Climate Change and Human Rights' developed by Knox can be considered as an ongoing study based on previous discussions and embedded in UN resolutions. Thus, the following timeline depicts the resolutions and their respective main outcomes, standpoints that are retrieved from Knox' *Mapping and Implementation reports* as well as in the *Framework Principles* again. These principles ultimately form the basis for Knox' assessment of

the connection between climate change and human rights. Building upon Knox' findings, I will assess how well his criteria fit the case study I will analyze.

#### The road towards the principles

The 2007 'Malé Declaration on the Human Dimension of Global Climate Change' indicates the first international agreement to recognize that '*climate change has clear and immediate implications for the full enjoyment of human rights*' (SIDS 2007, 2). On behalf of the Small Island Development States (SIDS) the declaration expressed their concerns about rights infringement especially for the already vulnerable inhabitants of low-lying states. Specific rights, e.g. the right to food, property and adequate standard of living are enumerated as well, with the incitement for the international community to take on their role and include the issue of rights obligations into e.g. the UNFCCC program (SIDS 2007).

Between 2008 and 2012, five resolutions on 'Human Rights and Climate Change' and 'Human Rights and the Environment' are adopted by the Human Rights Council (HRC). The respective documents are referring to one another, 'recalling' and 'reaffirming' previous decisions and statements. In order to illustrate the way towards Knox' newest principles, the analysis depicts the most important outcome of each paper with an impact on the framework.

## UN resolutions

March 2008: The HRC puts climate change on the human rights agenda, recognizing it as *'immediate and far reaching threat'* on human rights, furthermore, requesting to prepare further studies on the issue (Human Rights Council 2008).

March 2009: *Direct and indirect implications* for 'the effective enjoyment of human rights', including the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination. The increasingly intense *effect on the most vulnerable* is also recognized (Human Rights Council 2009).

April 2011: Sustainable development ought to be ensured, minding the rights and needs of *present and future generations* (Human Rights Council 2011a).

September 2011: Special attention to the safeguarding of Human Rights *principles* with regard to climate policy on all governance levels is emphasized, calling for *policy coherence and communication* (Human Rights Council 2011b).

April 2012: Appointing a *study period* for 'Human Rights obligation relating to a safe environment' (Human Rights Council 2012).

In 2012, Knox was appointed as 'Independent Expert' for the mandate on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and suitable environment. The assignment started out with the writing of a preliminary report, grouping the existing material, i.e. the foregoing UN resolutions, studying the status-quo, and eventually identifying need for action. In order to complete his mandate successfully, first priority was a greater conceptual clarity of the application of obligations. Nature, scope and content thereof was to be determined by consulting the relevant stakeholders (John Knox 2012, 3). The essence from the above depicted resolutions indicate the progress of the linked theme 'environment and human rights'. At first, the connection between the environment and human rights is established in general leading from the broader recognition of sustainability and human development, to the identification of singular rights violated through climatic changes (Human Rights Council 2008; Human Rights Council 2009). Intergenerational aspects have then been regarded (Human Rights Council 2011a). Another essential result was the distinguishing between substantive and procedural rights, the former were

those rights particularly prone to infringement, the latter being, through their compliance, supporting pro-environmental policymaking. On one hand, the safeguarding of a clean environment was pronounced to be necessary for the full enjoyment of a healthy (human) life (Human Rights Council 2011b). On the other hand, the enforcing of human rights principles, such as information access and participation was stated to be of importance for lasting environmental protection. In other words, people depend on a healthy environment and functioning ecosystems, and it is believed that those who are empowered and capable to make well-informed decisions, are more likely to work towards environmental protection (John Knox 2012, 10).

The preliminary report, composed in December 2012, did not yet make any specific recommendations, but rather named the areas and relationships to be considered more closely in the following period. In order to achieve convergence, best-practice examples were supposed to be found, and their mechanisms investigated (John Knox 2012).

April 2014: Recognizes that human rights law sets out obligations for states and good practice in reaching full rights enjoyment requires the adopting *strengthening and implementation of laws and other measures* (Human Rights Council 2014).

The mapping report represented an intermediate step, grouping the information gained from country case studies, as well as of preceding resolutions and various international agreements, conventions and frameworks. In cooperation with legal scholars and practitioners, a rough outline of procedural and substantive rights obligations for states has been developed. Procedural duties included the assessment of environmental impact and publication of information thereto, the facilitation of public participation in decision making and the provision on legal remedy (Knox 2013a, 11–12). In the description of said obligations, Knox referred to adjacent frameworks (i.e. UNFCCC, Aarhus Convention, Rio+20), emphasizing their common usage of the HRBA and its principles. Substantial obligations were on one hand the adoption and implementation of legal frameworks, and on the other hand, the regulation of private actors and their possible impact on human rights. In terms of legal regulation, the possible target conflict of fulfilling different societal goals was considered; stating that harmful activity needed to be in reasonable balance with its possible outcome for e.g. economic development (Knox 2013a, 12).

July 2014: Stakeholder strengthening through *dialogue and capacity building* is emphasized, referring to *procedural rights principles*. The ‘right to development’ and subsequent necessity for resources stresses social justice in environmental policy as well (Human Rights Council 2014).

April 2015: The report appreciates the work of Knox, and renews his mandate, with the title of ‘*Special Rapporteur on Human Rights and the Environment*’ (Human Rights Council 2015a).

### Implementation Report

The implementation report, after the three-year working period was a documentation of action recommendations and practical mechanisms for rights implementation. It included methods on *how* to precede; namely distributing information, building capacity, protecting the most vulnerable and strengthen cooperation between different actors. The actors in focus were intergovernmental organizations, regional bodies, governments and civil society organizations (Knox 2015, 3). It was emphasized that all institutions and bodies have their respective expertise which should continuously be incorporated into the human rights environment nexus through further and enhanced communication among them. At this point, Knox still recommended the ‘organic development’ of rights understanding and is opposed to a centralized treaty or framework, although requested by part of the consulted actors (Knox 2015, 6). Proposals for cooperation and increased enforcement of rights’ obligations included said universal treaty as overarching and comprehensive instrument. Further, forums on human rights and environment (taking the business and human rights forum as example) were suggested, as well as periodic review mechanisms on conduct and compliance. Knox, however, remains cautious in applying new instruments and recommends the studying and linking of existing regulations (Knox 2015, 12).



July 2015: Climate change is framed as *overarching issue*, affecting a multitude of sociopolitical areas, hence the cooperation with other institutions is emphasized. This integrated approach, is referred to in the resolution document as well as in the joined statement by the Special Rapporteur and UNEP (Human Rights Council 2015b).

July 2016: Obligations for state actors are predominantly mentioned with regard to the most vulnerable victims of climate change, non-state actors' responsibilities are found in the business and human rights guidelines (Human Rights Council 2016).

Knox' final report and presentation of the framework principles on human rights and the environment, was the product of his six-year mandate.

'*Respect, Protect and Fulfil*' are the duties prescribed to individual nation states as well as the international community. Thus, all states are urged to act in the best interest of human rights and to comply with their imposed due diligence through assessment, evaluation and communication. In addition to the outcome goals, the way there should also provide equal protection for all and prohibit discrimination. Equality before the law therefore means the recognition of different vulnerabilities and risk occurrences (Human Rights Council 2018, 7–8).

The rules of procedural justice include respect for freedom of expression, especially for human rights defenders and those who act as multipliers and supporters for the rights of others. Comparatively detailed and with the involvement of various levels and factors, Knox draws a bow to the future and emphasizes the importance of education and public attention. He mentions in principle 6 and 7 that the chance of positive sustainable development requires capacity building of the population, as well as the knowledge mediation of the relationship between humankind and nature (Human Rights Council 2018, 10). Procedural rights, such as access to information and the opportunity to participate in decisions, are also mentioned below (principles 7 and 9). Non-state actors are referred to, demanding prior assessment of any investment project, and calling on governments to promote transparency and prevent possible negative influences from companies. Standards towards private and public actors should be established and maintained (principles 8 and 12), for detailed obligations on their part Knox refers to the UNGP.

The 16 principles are, however, not a product of new content, but rather a synthesis of existing human rights and environmental law, clarifying the implications for the linked issues on that matter. The chosen procedure did not rely on the adoption of a specific 'right to a healthy environment' but rather greens the existing law (Special Rapporteur 2018). This interpretation

extends the scope of application of human rights violations to the realm of climate change. This approach allows to be further developed as our understanding of the environmental and climate change improves, as well as, to be even applied to other areas of jurisdiction requiring updating (e.g. privacy guidelines with new evolving technology). The aspect of evolving understanding of climate change was emphasized by Knox throughout the guidelines; policies are never to be retrogressive but always accommodate with progressing knowledge of the field. Despite the above stated advantages, critics argue for the establishment of a new right on ‘a healthy environment’, emphasizing its explicit enforceability.

In the run-up to the principles, it is again referred to the interdependence of human rights and environmental protection. On the one hand, protecting the environment, ensuring the functioning of ecosystems is essential for the enjoyment of human rights, and on the other hand, more effective environmental protection is more likely if more people benefit from human rights, especially from procedural ones (Human Rights Council 2018, 12).

#### Gaps and Challenges

For an analysis of the gaps in the framework principles, I consider three aspects as crucial. First, there is no clear formulation or quantification and description of 'environmental standards to be respected'. Environmental protection must be done to the extent that human rights are guaranteed, but the wide latitude for interpretation is a fundamental problem that has not yet been solved. The disclaimer in the foreword, 'no laws and guidelines may be retrograde', indeed poses a frame for action, yet leaves relatively much room for maneuver, especially as states always navigate in the balancing act between the fulfillment of multiple social goals. In addition, this very discretion of tradeoff is granted and leaves the priority order to the respective states themselves (Special Rapporteur 2018, 14).

Secondly, while the prevention and reduction of transboundary damage is designated as an obligation (OHCHR 2018, 15–16), the legal position on extraterritorial obligations has not been sufficiently clarified. The guidelines imply the causal connection of action in one place and consequences in another, granting transboundary significance which corresponds with court rulings such as seen in *Saúl v. RWE*. Legal liability for extraterritorial harm, reflected in either national or international law related to the ideas of the PPP. The monitoring of possible damage even beyond national borders lies within the realm of responsibility for transnational corporations as well, enshrined in the principles of ‘no-harm’ and ‘due diligence’.

Third, and resulting from the first two points, the question of remedy remains. The definition gap of substantive rights, as well as of the scope of responsibility remains, therefore resulting in a lack of clarity in the question of the amount of any reparation payments, as well as the responsible player.

Climate justice frames climate change as socio-political issue approachable through the normative of equity rather than the mere use of environmental policy and law. It was sought to enforce human rights standards and acknowledge the accelerating effect climate change has on socio-economic inequality and power disbalance. It thus aligns with the course of argumentation set by the UN's documents to climate change and human rights (UNEP 2015).

The unequal distribution of environmental burdens is expressed and coins the aim of the movement; 'those who suffer most are least responsible for the causing of the problem' (Bowyer 2009). With the interest of climate justice lying in the investigation of risks, rights and responsibilities of environmental changes and the distribution thereof, the focus is on *obligations* (derived from corresponding rights) and *responsibilities*, analyzing environmental, as well as civil and human rights and how their enforcement leads to possible protection of the victims. Responsibility can differ from hard-law rights and obligations, reflecting a rather normative estimation of accountability (Huntjens and Zhang 2016, 8–10). Climate justice puts environmental issues, mainly climate change induced consequences into a legal context, indicating the official understanding of the link between human life and the environment. It uses ideal normative ideas to approach global climate change policy (Schlosberg and Collins 2014, 365).

UN Deputy High Commissioner for Human Rights Flavia Pansieri concludes on the aspects of global and intergenerational justice when again emphasizing the importance of acting upon climate change with the application of a human rights lens. 'The poorest countries, their children and all our children' will suffer the most (Office of the High Commissioner for Human Rights 2015, 6). Similarly describes it the Prime Minister of Tuvalu, whose island is majorly impacted by climate change. 'It is an issue of fundamental justice' that the least responsible and most vulnerable are so disproportionately impacted (Office of the High Commissioner for Human Rights 2015, 8).

The HRBA is meant to address the cross-cutting issues impacted through climate change and thus grant appropriate attention to second generation rights, as well as those (third generation) rights that require increased cooperation and communication. One example is the prevention of negative impacts that can arise from a non-holistic approach to mitigation or adaptation measures, e.g. when

implementing climate infrastructure projects such as dams. Especially marginalized groups (i.e. often indigenous peoples or people of lower socio-economic class) are not sufficiently considered and then, although pro-environmental action might be taken, other rights such as the right to cultural heritage are violated.

Amongst nation-states, the PPP is reflected in the principles of CBDR which recognizes historic emissions as share of accumulated responsibility and varying abilities to pay (UNFCCC 1992, 5). In consideration of a broader spectrum of actors and according to the climate justice perspective, major polluters (i.e. fossil fuel industry) are bound to be held accountable for their pollutive behavior (Moellendorf 2012, 136). In order to determine responsible actors, the PPP has been introduced. It is the oldest environmental policy principle, presented by the OECD in 1972 and adopted into the Rio Declaration in 1992 (Principle 16). It has also been enshrined into the European Communities Treaty and several national legislations (European Commission 2018).

The principle is understood to indicate overarching environmental responsibility, including prevention, monitoring and lastly reparation of possible damages. In economic terms this is called the internalization of external costs. Despite those efforts, the principle remains a concept of soft-law (mainly found in international sphere and without legal enforceability) and is ambiguous in its interpretation. Three issues, which are also found in the lawsuit are, first, those kinds of pollution that are not unlawful but still cause environmental harm, second the question of who to hold accountable in the chain of supply and production, and third, how much must be paid.

Verheyen, for example, cannot base her argumentation regarding excessive pollution on a legally set pollution thresholds and demand consequential payback. RWE even argued against their responsibility, and instead pleads for all consumers of (fossil) energy to be responsible. Lastly, the share of costs to be borne is also not clear from the principle (European Commission 2012). Businesses should furthermore be compelled to include external costs into their business plans and inform stakeholders, investors and about the status of environmental impacts as well as consequences of economic costs.

In practice, in the case of Saúl, it has already been shown that (1) the substantive right to integrity and property has been recognized, (2) the causal link between GHG emissions and local climate change is recognized, and thus a fundamental cross-border responsibility of RWE is possible. The amount of possible reparations payments (3) has not been discussed in court. It should be noted,

however, that the quantification of property and its loss is much simpler than the calculation of the value of human rights per se, as stated above.

### 5.3 Business and Human Rights: The UN Guiding Principles

#### Business actors

So far, the approach of applying a human rights lens onto climate change issues has been analyzed. The following section will advance from the state-citizen relation common in the human rights context and analyze the role of businesses regarding human rights.

The immense impact fossil fuel companies have on climate change has been stated above, along with Heede's study on the carbon majors. In the next section, I will show how companies are to be considered relevant players regarding the human rights agenda. Traditionally, states are seen as responsible for the protection and provision of human rights and the setting for rights implementation respectively (Backer 2010, 68). However, the development from 'state-exclusivity' to 'state-centrism' as Wettstein calls it, has emerged along and through the work of Special Representative for Business and Human Rights (Wettstein 2015, 163).

#### Special Representative for Business and Human Rights

In 2005 John Ruggie was appointed by UN General Secretary to be Special Representative for Business and Human Rights. His appointment and the outcome of the three-pillar framework should mark an important step in the promotion of human rights and more so their incorporation into the private sector (Sanders 2015, 2–3). Ruggie's work is about principles, not rules, which reflect a common or agreed upon moral understanding that sets out a framework for action. The development of concrete rules would have been difficult as the actors, companies, differ so much from each other. Such an attempt, as was Ruggie's reasoning, would certainly have led to inadequacies. In addition, as Ruggie points out, there are correspondingly precise rules that protect, for example, human labor rights (i.e. ILO). Hence, the objective of the guiding principles is another, a more fundamental one, namely the aim of responsibility attribution (Connor 2018).

The Guiding Principles on Business and Human Rights have been adopted in a UN resolution in 2011, implementing the framework of '*Protect, Respect and Remedy*', directing transnational corporations and other business enterprises. The framework includes 31 principles, divided correspondingly to what became also known as the Ruggie-Principles. It was the first initiative for corporate human rights responsibility to be authorized by the UN. The three general principles of the framework oblige states to *respect, protect and fulfill* human rights, while business

enterprises are primarily required to comply with law and *respect* human rights, that means to act with 'due diligence'. In case of violation of these obligations, businesses then need to compensate the damage, providing *remedy* (OHCHR 2011, 6).

### Three pillars: Protect, Respect and Remedy

The development of the principles is significant because Ruggie created a governance structure that builds on human rights while at the same time holding both, states and companies accountable. Thus, working towards an unprecedented movement against the fragmentation of international law (Backer 2010, 43). He developed a way of incorporating the obligations of companies into those of states, relying on proven concepts and mechanisms backed up in a state context, that is, by the control of governments (Backer 2010, 48). Companies are, in the broadest sense, first manufacturers or providers of goods and services. They act within a market structure and are initially not subject to any political mandate. One of the reasons for the increased focus on companies is because social structure has changed; companies have grown in number and sphere of influence, they shape the economic, political and social picture (Addo 2014, 145). In line with its increasing influence, normative and legal ideas must be compared, checked and implemented. In the case of the first pillar, protection of human rights, the state remains the main representative. In the sense of his duty of care, he must protect his citizens from human rights violations by the state and third parties. Since human rights are a binding institution, which was developed and codified in this same canon of state-citizens, the term 'duty' is appropriate. Principles 1-10, which describe the duty of protection of the state, say that it is its responsibility to set expectations and guidelines within its borders. The obligation to protect includes operational regulations, such as the adoption and enforcement of laws. On the one hand, this should protect the right holders and, on the other hand, indicate the room for maneuver for companies. Clear handling is a preventive measure to promote communication and positive action and to counteract infringements. It is recognized that companies operating in conflict zones are at a higher risk of infringement. States should therefore have a relative influence and supportive effect, even beyond the borders, but rather where business action takes place (John G. Ruggie 2011, 3–12).

The second pillar, respect for human rights, is divided into foundational and operational principles. According to this, the first fundamental principle for companies is to respect all human rights, regardless of the commitment of their respective home state. As a minimum rule, the internationally recognized human rights are called to be followed. In addition, the scope of

responsibility amounts to the directly executed actions, as well as effects to be associated with the company. In order to meet these requirements, the preparation of internal guidelines is recommended. Similar to the operational transparency endorsed in the context of states, this expresses the recognition of increasingly complex production- and supply chains. From this understanding arise the operational principles. They seek to clarify the overarching goal of protecting human rights at all levels within companies, and to build coherence between that very responsibility and all the company's activities and goals (John G. Ruggie 2011, 13–17). 'Human rights due diligence' in the context of corporate responsibility is a new term. This means that companies must act with care and consideration. This responsibility, as Ruggie clearly states, relates to both, in-house actions and all sections of the production- and supply chain. Especially in view of the growing number of transnational corporations and production techniques spread across the world, such a comprehensive attribution is important. By recommending a definition of in-house standards and their elaboration, the companies are given an argumentation aid in case of possible accusation. Qualitative and quantitative indicators are therefore created to facilitate internal and external feedback (John G. Ruggie 2011, 23–24).

The third pillar, *remedy*, concerns both states and corporations as well. The provision of an institutional landscape, where judicial, administrative and legislative structures are transparent and accessible to all citizens, is within the responsibility of governments. The importance of such an environment has been discussed extensively above in the principles of the human rights approach. At this point, companies and their responsibility to rectify possible harm is included into the accountability scope. Principles 22 through 31 describe the obligations for businesses to provide remediation in case of adverse impact on human rights are explained. The operational principles reflect, again, the human rights principles of accountability, legality, accountability and participation, when demanding appropriate grievance mechanisms both judicial and non-judicial. Their effectiveness is suggested to be measured through a number of 'core criteria', including legitimacy, accessibility, predictability, equity and transparency (John G. Ruggie 2011, 25–32).

### Gaps and Challenges

The main challenges that can be found in Ruggie's principles regarding the implementation of business' responsibility are firstly the strong remaining reliance on states and secondly, the insufficient outlining of concrete obligations.

The strong reliance on states to be burden-bearer and agent of responsibility to protect human rights results from the governance mix, Ruggie has chosen in the formulation of the guidelines. Companies are only implicitly tied to human rights law, as it is the state that must implement law on national level, where companies then have to comply with civil law (Lindsay et al. 2013, 9). Furthermore, the insufficient clarification of duties makes it difficult to pin down concrete non-compliance. Proponents of an international agreement argue that such a treaty would provide more concrete solutions than the normative principles do. Moreover, arguments in favor of such a treaty are by no means unilateral. Advocates argue, for example, that predictability and stability would benefit both potentially injured parties and the companies themselves. There would be no costs and efforts caused by processes and protests, which consequently supports the stability of companies and investors, stability, from which, so it is argued, the workforce benefits as well (Notre Dame Law School 2014).

The characteristic of Ruggie's approach of combining hard- and soft-law mechanisms, and thus regulating the actions of companies embedded in the state context, on a somewhat voluntary basis, is the so-called 'smart-mix' (Wettstein 2015, 165). Normally and at state level, governments set standards and rules and ensure that they are adhered to. Ruggie's motivation for the implementation of such a structure is evaluated quite differently. Proponents emphasize its real-world applicability, meaning that states are equipped with the necessary structures and instruments to enforce human rights' (Bernaz 2014). Ruggie's statement on focusing 'what works best in creating change where it matters most' (John Gerard Ruggie 2013, xlii) is hence the credo. After all, Ruggie was appointed after the implementation of a binding treaty, the UN Norms on Business and Human Rights, had failed (Miretski and Bachmann 2012, 5). In the larger governance context, however, this compliance guarantee is a major challenge and therefore the search for more creative solutions began (Kinderman 2017, 29–30). L. Backer, Professor of Law and discussing scholar of the UNGP, emphasizes the innovative aspect of the principles at this point. He believes that governance systems to ensure corporate conduct do not have to come from national law, but can build on international consensus (Backer and Sherman 2011, 3). The mentioned mix form gives companies room for self-examination, supported by state and private action. In addition, and equally important is the assurance of a well-informed public, which is thereby attributed a control function. Non-governmental and civil society organizations ought to be able to understand, review and, if in doubt, object to the decisions of both government and business. This embedding into a



system of social norm can, according to proponents, be very powerful, if the principles of participation and transparency are upheld. As long as important stakeholders believe in a system, it has just as much strength as binding law Backer argues (Backer and Sherman 2011, 4). Supporters of the 'new governance' theory attribute such an important role to 'participation' that they even argue that Ruggie should have built a fourth pillar into his model; *participation* (Melish and Meidinger 2012, 3). Critics argue however, that Ruggie's proposed soft-law-hard-law mix is inadequate in that it makes use of worn concepts such as 'due diligence', which no longer have any significance. According to the critics, the already wide acceptance of those concepts has led to a great acceptance of the UNGPs, however, not to an improvement in corporate acting. Social change is not achieved through such tentative steps (Melish and Meidinger 2012, 6). Corporate decision-making, based on the strategy of comparative advantage and only guided by soft-law mechanisms, creates flexibility, promotes innovation and adaptability, argue others (Augenstein 2018, 256). While the existence of hard-law aspects conveys predictability, liability and authority. For the successful practical application of such mix forms, complementarity and compatibility are prerequisites (John Gerard Ruggie 2013).

Critics of the Ruggie Principles point out that the ultimate responsibility for implementing the norms is being returned to the nation states. Consequently, it is governments who ensure the controlling of companies and, in a given case, impose sanctions. Although theoretically all companies are bound by the principles, the central review mechanism is located at the national level and thus depends on the cooperation and willingness of the government (Barakat 2016, 600). Originally, the framework was meant to close the regulatory gap between companies and human rights compliance, ultimately the state remains as a regulator and thus also the question of how much improvement has been achieved really. This type of regulation is particularly disadvantageous for people in states with weak regulation and high levels of corruption, a concern stated especially by scholars researching governance structures in the global south (Adeyeye 2012, 193). If the state's 'hard' part of the governance mix does not work there, then the necessary, but too weak, antagonist will upset the balance. Critics argue that in these cases the inequality between global north and south expands (Niebank and Schuller 2018, 4). The observance of human rights should, however, not depend on such factors, giving transnational corporations the opportunity to take advantage of such unequal conditions. Principles 23 and 24 remind explicitly of the special

attention required when businesses navigate in so-called weak states or conflict zones, as the states' role might not be carried out as effectively (OHCHR 2011).

Samantha Besson formulates the lack of research on duties and obligations corresponding to human rights.

In the discussion of who is bearing the burdens or who is responsible for carrying and implementing human rights, opinions diverge. On the one hand, the two main currents are those that see the state as the principal burden-bearer (Beitz 2009, 122) and thus orient themselves towards the established state-citizen relationship. On the other hand, there are those theorists who want to see the spectrum of responsibilities extended to institutions and non-state actors (J. Griffin 2008, 101–4). The formulation of Ruggie's principles and, after their endorsement, the official position of the international community, coincides with the opinion of the latter. Companies are also attributed a role of responsibility with regard to human rights (Lindsay et al. 2013, 12). Although this attribution is made, the definition of obligations has yet to be defined in concrete terms. Similar to Ruggie himself, Besson says that human rights consist of moral and legal components (Besson 2015, 248; John Gerard Ruggie 2017, 13). According to her, 'moral component' is the right to possess human rights (Besson 2015, 250). It describes the idea of a moral community in which, for example, equality is regarded a value. This common understanding of norms and values thus creates a space, which Besson describes as democratic (Besson 2015, 249), in which the 'legal component' can now also be applied. In the UNGPs, the legal compliance of businesses with human rights' law is reaffirmed (legal component), however, a moral responsibility to respect rights is stated as well (moral component) (John Gerard Ruggie 2017, 13). This 'two-way street' (Besson 2015, 250) is comparable to substantive and procedural rights. Only if, for example, the participation of all people (i.e. HR principles of participation and empowerment) is guaranteed can the substantial rights (i.e. the right to life) be implemented.

The moral or normative aspect of human rights refers to the preservation of a democratic space in which participation and integrity is possible for all. Different schools of thought now evaluate the responsibility to contribute to the protection of this space differently.

Besson names the difference between 'responsibility' and 'duty' as the fact that, on the one hand, responsibility is much less concrete and, on the other hand, the person responsible is not precisely defined. Rather, it describes responsibility as the moral striving of all to achieve the state described above. The state in which it is then possible for the duty-bearer to fulfil their duties (Besson 2015,

262). While some scholars explain the different terminology with the corresponding legal implications, assigning legal meaning only to ‘duties’ but not to ‘responsibilities’ (Wettstein 2015, 167), others object; ‘duties’ and ‘obligations’ can just as much be based on moral norms rather than on law (López 2013, 68). Apart from the appearing unclarity in terminology and their consequences, it is to say, that Ruggie did not want to invent new rules, or even law, but rather collect and clarify the status of regulations found (Barakat 2016, 597).

However, as for the ascription of responsibilities to non-state actors, general applicability is rather uncontroversial (Zerk 2009, 28). Besson names the following possible criteria to do so; *causality, harm, capacity, benefit or special ties* (Besson 2015, 264). These criteria also play a role in the framing of climate justice theorists. Causality and harm can be found in the Polluter-Pays-Principle, while capacity rather follows the Ability to pay Principle and Henry Shue's argument, in which he says that one right must never be defended at the expense of another (Shue 1993, 50–52). The premise that no one should benefit from human rights abuses is reflected in the recognition of historical emissions and the assumption that prosperity builds on previous emissions, noting the need for social regulation to achieve fair distribution of benefits and burdens (Zerk 2009, 46). Although any of the above criteria apply to both states and non-state actors, there is no agreement on an actual instrumentality for distributing responsibility. Miller describes this situation as a 'protection gap' between responsibility and obligations (Miller 2007, 274). Whether human rights standards for businesses are fit to fill this gap is discussed controversially. Although many companies do endorse human rights instruments, they indicate it as voluntarily and non-binding, oftentimes within their ‘corporate social responsibility’ (CSR) agenda (Zerk 2009, 43).

The argumentation to put greater focus on non-state actors is supported by Beitz and his example of companies having increased influence of transnational politics and economics (Beitz 2009, 122). He further states, align with my analysis of Ruggie’s principles, that human rights treaties continue to put main responsibility on states, assigning them the task to guarantee compliance by non-state actors. Directing principles directly towards companies is not (yet) common practice he states further (Beitz 2009, 124). Said argumentation relates to the companies’ power and argues for increased responsibility along with that. David Miller approaches the allocation of responsibilities differently, namely by distinguishing between causal and moral responsibility (Miller 2001, 455). In my opinion, all three categories (increased influence, causal and moral attribution) apply to the case of fossil fuel companies. Causal responsibility, as claimed by Miller,

is the direct linking between a deed and its consequences. A connection which has been proven in the case of GHG emissions and climate change. The moral responsibility might be harder to claim as mal intention must be part of it (Miller 2001, 456).

Furthermore, important is the question of whether the existence of such responsibilities can lead to compensative action, such action that is precisely claimed by Saúl. Access to *remedy* is described in the third pillar of the framework and manifested in the core-criteria legitimacy, accessibility, predictability, equity and transparency (John G. Ruggie 2011, 25–32). Intuitively understandable is the need for access to grievance mechanisms for those who have suffered rights' infringement, this includes both the institutional architecture (provided by state and state actors), as well as the businesses consideration itself, namely the explanation of potential impact for the various stakeholders along the value-chain. Predictability refers to the absence of arbitrariness; only then complaint mechanisms are felt to be legitimate and effective. Lastly, equity and transparency also show that Ruggie's principles are guided by the standard of procedural rights. All people should thus be granted equal access to and information about their options in case if rights' impact (Lindsay et al. 2013, 28).

#### 5.4 Case Study

##### What kind of case?

The case study of this paper is a lawsuit by a Peruvian farmer against a German energy company, approaching the company due to their destructive contribution to CO<sub>2</sub> pollution (Ananias et al. 2017). The recognition of climate change impacts on human rights, as has been shown above, implies a rights-based approach to climate change related issues. Therefore, the chosen case is examining whether this implicit recognition is carried out in a claim against an energy company. 'Saúl v. RWE' builds on German civil law, however, core elements of human rights law (life, health, property) are found in civil rights and thus civil law is activated in the sense of human rights (Mechler et al. 2019, 476). The direct application of human rights law in climate lawsuits is yet unprecedented, also because binding treaties on business and human rights have not been negotiated. Dr. Roda Verheyen's use of human rights standards implemented in national law allows the drawing of conclusions regarding their applicability. She argues for the taking of responsibilities to the same extent as they are outlined in Ruggie's UN Guiding Principles on Business and Human Rights discussed below. According to her understanding of justice, industrial countries should decrease their emissions as much as possible in order to contain environmental

destruction and protect intergenerational justice (Verheyen and Ohm 2018). She also describes her notion of global justice with it being unfair for people on one side of the world to suffer from climate catastrophes and damage because coal power is produced in other parts.

#### Content of the claim

Saúl Lliuya is a Peruvian citizen who started a lawsuit against the German energy company RWE AG in November 2015. He lived in the city of Huaraz at the foot of Lake Palcacocha, a glacial lake in the Andes in Peru. He claims to be at risk of a flood in his city due to melting glaciers, resulting in an increase in volume and surface area of the lagoon (Rechtsanwälte Günther 2015). Saúl draws the connection between greenhouse gas (GHG) emissions and climate change and consequently the melting of glacial ice in the mountain chain above his village. He thus demands accountability from the responsible parties and chose the RWE AG as the largest emitter of GHG in Europe. According to the Carbon Majors Report, the RWE AG is responsible for 0.47% of global GHG emissions between 1988-2015 (P. Griffin 2017, 14) leading to Saúl Lliuya's demand to receive said share of the arising costs for adoption, amounting to 17,000 €, of the total adaptation costs that he will be facing in order to protect his village from potential flood wave (Rechtsanwälte Günther 2015). The case exemplifies the issue of liability towards emissions and consequently personal damage.

#### Timeline and major steps

In November 2015, the case was first brought in front of the regional court Essen, Germany. Saúl's claim was the removal of destruction of property by global climate change. He requested the acknowledgement of proportionate liability for climate change according to the share of global GHG emission and thus proportionate covering of arising adaptation costs (Rechtsanwälte Günther 2015).

Before cases are heard in court, the question of justiciability needs to be decided upon. It has to be examined whether there is an offense that can be settled in court, in contrast to questions exclusively regulated in the political sphere. In climate change litigations it is debated whether the issue is such a matter of jurisdiction or rather a purely political matter.

Hermann Ott, jurist and former member of the German parliament, represents the proponents of the legal path. He and his colleagues from Earthclient, a non-profit environmental law organization, want to force corporations and governments into court to protect the climate, 'because they do not fulfill their most important duty' (Ott 2018). Opponents of the legal path are

mostly found among conservatives as well as the questioned companies themselves (Hardcastle 2013, 22). Shell’s management does ‘not consider the national inquiry to be the correct forum to discuss climate change issues’, it states after being requested to respond to a legal claim made by the people of the Philippines towards a group of major emitting companies (Marjanac 2018). The number of ongoing climate lawsuits backs the argument of need for legal accounting. The range of complaints is wide, with suits against nation states as well as corporations, and aims varying from protection of vulnerable and marginalized peoples, pursuing higher emission reduction targets to seeking financial compensation for loss and damage (Averill 2009, 140). Admission in front of court has overall increased, recognizing the justiciability of climate change cases (Nachmany et al. 2017, 13).

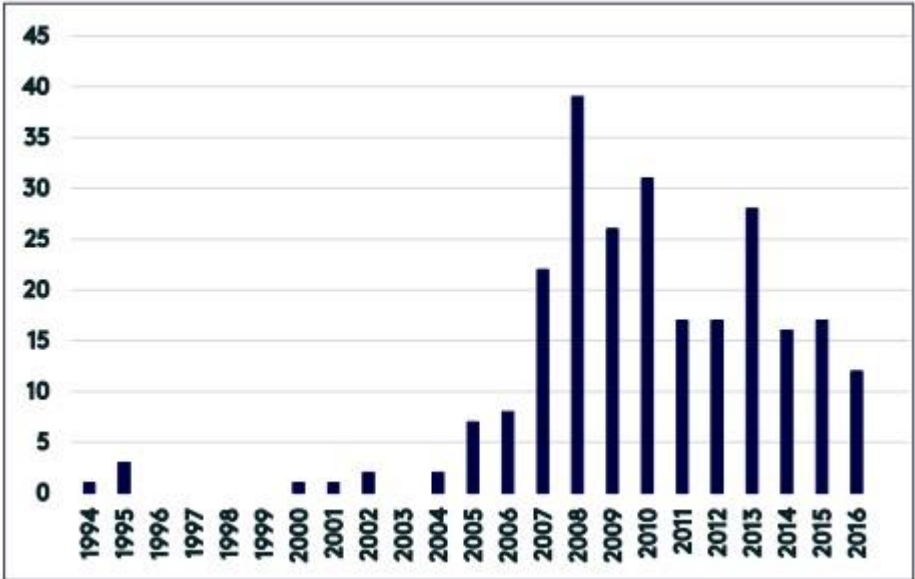


Figure 1: Number of litigation in climate change cases in 25 jurisdictions (Nachmany et al. 2017, 13)

The case was then proceeded with under German tort law<sup>5</sup>, because of the company’s headquarters in Essen, Germany. After the general hearing was approved, causality had to be evident, meaning the connection between crime and damage must be verified. This question is central to Saúl’s and similar cases, because only through the legal finding of emission as an act causing damage, a culprit of said action can eventually be identified.

<sup>5</sup> The lawsuit draws upon German civil law, however the legal base exists in similar form in 50 states around the world (Germanwatch e.V. 2017b).

Causation and its proving pose one major hurdle in climate litigation and are basically the gateway to the start of an actual court case. It requires the acknowledged link between an occurring damage as result of GHG emissions and thus an understanding of climate sciences (Roderick 2010, 14). The difficulty to achieve such proof has been stated in a study by the Potsdam Institute for Climate Impact Research (PIK), an interdisciplinary think-tank, in 2010, surveying 32 legal experts and climate scientists. Having proven causality legally is therefore already a historical step made in climate litigation.

#### How to prove causality?

1) But-for-test: ‘But for the defendant’s negligence, the plaintiff would not have been injured’

(Duhaime 2012)

The first step to prove causality requires to meet the above stated necessary condition of recognizing contribution to a claimed damage. To attest liability, however, mere contribution might not be sufficient, which is why a second condition must be met as well.

2) Proximate cause: ‘[...] whether the defendant’s conduct was a substantial factor in producing the harm’

(“West’s Encyclopedia of American Law” 2008)

Proximate cause or adequacy of liability is supposed to limit the extent of legal responsibility, ensuring that the action is immediate enough in a chain of actions to be legally valid.

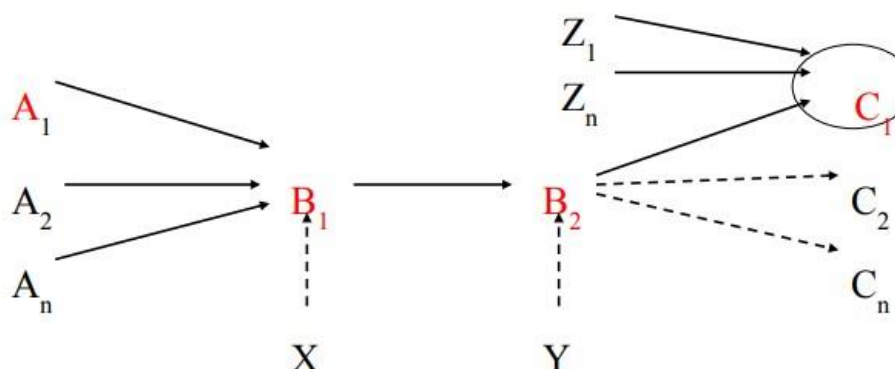
For Saúl however, said causation has, at first, in December 2016, been dismissed, claiming neither condition to be fulfilled. The court did not accept the chain of action presented by Saúl’s lawyer, stating the relation between a singular source of GHG emissions contributing to the amplification of climate change and consequential increased risk of flooding. The court decided, that the necessary ‘cause-in-fact’ could not be confirmed, as the impairment of a possible flood would continue to be, even if RWE stopped all their emitting activities (Ananias et al. 2017). Further, proximate cause was denied, as ‘billions of emitters have contributed to pollution now and in the future’, led the court to refraining from assigning responsibility to particular agents, no matter their size of contribution (District Court Essen 2016).

Verheyen denotes the decision to be ‘collective irresponsibility’, where basically no one can be held accountable because everyone is contributing to the problem (Dörrer 2016). Climate change, she claims, is an issue of global scope and can only be solved through collective action, taking on collective responsibility (Cole 2015, 292). Dr. Verheyen therefore appealed the decision in November 2017 and went to the next instance, the High court in Hamm. The appeal decision, the general recognition of responsibility and thus reopening for arguments, has already made legal history (Germanwatch e.V. 2017a).

The case identified as admissible has to go through the same legal procedure as described above, however, proponents are optimistic, pointing towards the scientific progress made since the submission of the first claim, which was based on data from 2013 (Hamilton 2017). Attribution science studies changes in climate, slow onset and sudden events, and is increasingly able to make quantitative statements about human-induced influence and probability of occurrence (National Academies of Sciences, Engineering 2016). Evidence will draw upon resulting reports, such as the IPCC report, which has already been noted to be valid.



## Traceability of Causal Chain



A<sub>1</sub>: an GHG emission

B<sub>1</sub>: increasing density of GHG in atmosphere

X: other contributing causes for B<sub>1</sub> (e.g. deforestation)

B<sub>2</sub>: Global warming

Y: other contributing causes to B<sub>2</sub> (e.g. sun spots)

C<sub>1</sub>: accelerating of glacier melting and rising water volume of lagoon

Z: (possible) other contributing factors to C<sub>1</sub> (e.g. albedo, El Niño)

C<sub>2</sub>-C<sub>n</sub>: other effects of global warming (e.g. extreme weather events)

Figure 2: Causality in the Huaraz Case (Frank 2017)

The court demands the affirmation of the following four steps and followed the chain of causality presented by Saúl's lawyers in the first instance (see Figure 2). Each individual emitter contributes to the rising of GHG concentration in the atmosphere (1), said elevated concentration then leads to an overall effect of global warming (2), increased temperature accelerates the melting off glaciers at the location in question (3), the melting leads to rising water levels and a growing risk of floods (4) (Frank 2017). Similar argumentation to the illustration above will support the proof of the necessary condition (1), the demanded proof of adequacy or proximate cause (2) implies that the occurrence of the possible damage needs to be probable. Saúl's case describes an event of slow onset changes, such as desertification, loss of biodiversity or the rising of water levels. Those can be traced back to rising GHG concentration in the atmosphere and subsequent changes in the environment.<sup>6</sup> Their likelihood of occurrence is thus predictable with high likelihood. One further

<sup>6</sup> Although attribution science is making immense progress, the ascription and forecasting of extreme weather events is still more difficult, thus impeding the advancement in cases of i.e. damage through hurricanes.

argument in the first instance, regarding the ‘innumerable emitters’ is probably dismissive, as RWE’s accumulated global emission roughly equals those of the Netherlands (0.5%), a quantity that can hardly be considered insignificant (Frank 2017). The experts surveyed by PIK stated their concern similarly, that through the emission contribution of everyone no one will be held liable. and at the time of the study in 2010, it was also still seen as very improbable to find one company liable (Roderick 2010, 15).

While the final judgment will not have been pronounced by the time this paper will be finished, the case may nonetheless exemplify the advancement in jurisdiction and interpretation of accountability relations. Verheyen supports this argument of the importance for precedence cases, stating that although jurisdictions differ worldwide, future plaintiffs could draw on similar norms and assert a claim (Verheyen and Ohm 2018).

## 6. Discussion

The analysis of international policies and case documents has shown, that legal and policy status obliges companies to comply with human rights standards on substantive and procedural level. Enterprises ought to follow underlying normative guidelines, manifested in principles of ‘no-harm’ and ‘due diligence’ (Special Rapporteur 2018). However, when put into practical context, as seen in the case study, there is reluctance on part of the companies as well as, to some extent, in public and jurisdiction. Climate litigation is a rather new development and courts are still challenged to navigate within this new territory. I argue that notwithstanding the arising challenges, the HRBA poses a constructive pathway of achieving a wholistic scope of responsibility and lastly increase climate justice. Knox’s linking of climate change and human rights lays the groundwork for this overarching approach and the application of human rights standards onto climate change challenges (Knox 2018a). Ruggie then formulates human rights due diligence as obligation of businesses, thus introducing them as an actor actively involved in human rights respect (OHCHR 2018). They are specifically requested to avoid and reduce all risks of rights infringement and provide remedy in case of harm done. The subsequent relevant question is how to prove negligence and enforce said duty of care in a legal sense.

The human rights-based approach is an integrated approach, considering the cross-sectoral character of environmental and human rights policy, it applies normative and legal principles of human rights onto various other political issues (UNEP 2015, 3). Thereby it aims to achieve coherent policies for overlapping or rather interconnected issues, in order to create justice for rights-holders and capacity enhancement for duty-bearers. The method implies a collective understanding of the normative human rights framework and its underpinned values (Bell 2011, 104). It indicates this common denominator of a moral standard delineating the field in which policies are to take place, as well as operational guidelines; the ‘rules to play by’ (OHCHR 2012, 3). Outcome and procedure; substantive and procedural rights are mutually relevant for the implementation of the approach as the theoretical framework is based on discourse. The analysis of issues with the application of the HRBA includes obligations, inequalities and vulnerabilities, aiming to prevent discriminatory practices and unequal distributions of power (Office of the High Commissioner for Human Rights 2015, 9).

The HRBA addresses policy issues under consideration of human rights standards. It then poses the question of a) ‘*Which rights are at stake?*’ and b) ‘*Whose rights are violated?*’. Applied here, it builds on the recognition of the dependence of human rights enjoyment on a healthy environment on one hand, and the influence human rights enforcement has on environmental protection on the other hand.

#### The Human rights- based approach in climate litigation

The practical application of the HRBA, as discussed in this paper, occurs in court, when plaintiffs claim the violation of e.g. health, life and property rights. Environmental or climate change policy are to be embedded in the human rights context, meaning that no human right can be infringed due to environmental legislation or the lack thereof. Rights furthermore imply agency and a tool to empowerment to be an active claimholder as opposed to passive beneficiaries or victims of state policies (Skurbaty 2014).

According to the character of an integrated approach, that sees climate justice as an issue embedded and linked with human development, it is sought to enable rightsholders to actively assert their rights, building on the understanding that only through the implementation and fulfillment of human rights a positive development can be possible. By contrast, rights infringement, in this case triggered by climate change, leads to reduced capacity of the rights-holding subject and is thus detrimental to development (Malone and Belshaw 2003, 80).

Nonetheless, in order for a right to be held true, a duty-bearer responsible for its upholding is necessary. In the above-mentioned state-citizen dichotomy the role allocation was rather clear, yielding the obligations to the state. When, however, further actors are considered, the need to establish c) *How and to what extent can businesses be framed as duty-bearer?* arises.

In order to answer this question and to assign obligations, substantive human rights must be center of policymaking on one hand, and the normative principles of holding up those rights must be ensured on the other.

#### Litigations as a new way forward?

Climate litigations worldwide have increased 20-fold over the last 20 years, to over 1,200 cases as of now (Grantham Research Institute 2017). Defendant parties are mostly governments, however, companies, especially the carbon majors, have now been tackled manifold. Claims include failed risk disclosure and misleading ‘green advertisement’, reforestation and monetary reimbursement demands, and issues with emission certificates (Sabin Law Center 2018). Out of the 20 cases against companies listed <sup>7</sup>, the majority draws on national environmental and civil law, rather than demanding responsibility for violating human rights as criminal count specifically. National governments nonetheless have been confronted with regional human rights conventions as well as judgements referring to the Kyoto Protocol (in Greece, 2016)<sup>8</sup> and the UNFCCC principles of fairness, precaution and sustainability (Urgenda case, 2015)<sup>9</sup>, amongst others (milieudefensie 2018). Jurisdictional framing depends on the strategy most likely to be successful as well as the respective national legal system. Claims draw on human rights such as the right to bodily integrity or economic or civil rights, like property rights and claim for damages.

*‘The time has come [...] to check and control the degradation of the environment and since the Law courts also have a duty towards the society [...] it is plain exercise of judicial power to see that there is no such degradation of society and there ought to be any hesitation in regard thereto’* (Prasad 2017, 92).

The legal aspect of corporate responsibility is, as discussed, rather new and makes use of policies of soft- and hard-law character, as well as increased scientific knowledge and the acknowledgement of climate change’s influence on human rights and thus general justiciability of climate change issues in an individual context. Climate change related rights violations in a legal

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<sup>7</sup> The litigation data base distinguishes between US and non-US cases, due to the differences in national form of jurisdiction.

<sup>8</sup> Non-Compliance Procedure of Greece under Kyoto Protocol (Sabin Law Center 2007)

<sup>9</sup> Urgenda Foundation v. Kingdom of the Netherlands (Sabin Center for Climate Change Law 2015)

sense involve a plurality of sources of law, creating complexity in application and interpretations (Knox 2018a). Professor Thomas Pogge founding director of the Global Justice Program at Yale, reminds that in the case of climate change, human rights, international law, environmental law, and private and public law are affected, because the consequences of climate change violate every single one of these legal bases. Despite the resulting complexity, Pogge describes climate litigation as an opportunity, a path that has not yet been taken and may be able to counterbalance the inaction of governments (Bjerknes Center for Climate Research 2015).

Nonetheless, the method of litigation is not necessarily to be regarded as contrast to climate policy or politics, but rather as a development thereof, building on both successes and failures. The expert group of ‘Loss and Damage’, established at the COP 19, for example, published yearly reports on the topic and thus provides a scientific basis for legal claims. Yet, says Verheyen, the Warsaw-Mechanism does not provide support to any one affected person individually. The given instruments must be applied concretely in order to have an effect for individuals. She emphasizes the importance of making climate change personal and a ‘publicly discussed topic’ (Reitan 2018). Others argue that the legislative, responsible for the creating of statutes and regulations, cannot comply with their tasks sufficiently, and thus other branches of government must step in. *‘Climate litigation is the inevitable result of a failure of two decades of talks. But it is also an important way of reframing the climate crisis as a human rights emergency.’* (The Guardian 2017). Ott, head of department of climate politics at Wuppertal Institute, with this quote expresses both frustration and hope, driving forces in the face of a serious global crisis.

Uncertainty about the power and role of the judicative remains nonetheless; in a lawsuit by the City of New York, the District judge initially decided ‘that the legislative and executive branches have jurisdiction over climate change instead of courts’. The city went into revision and NYC chief climate policy advisor wants to convince the important role courts have; ‘it is one way to change consciousness and change the conversation’ (Drugmand 2018).

‘Judicial leadership’ (Estrin 2016, 23) is taken, when courts face their role of serving society beyond the application of laws and pronouncing of rights. Such shifts in power distribution have been called for by climate plaintiffs, and increased number of people who went to court for issues of rights violations through climate change. Nonetheless, discussed from a rights-based perspective, it can only be a temporary development on the way to improved policy implementation and consequential rights enforcement. In the long run, the relying on insular

lawsuits would contradict the procedural principles of human rights. Litigation is cost- and time intensive as well as unpredictable in its outcome and thus not desirable as solution for society as a whole.

Dr. Marjanac and colleagues from ClientEarth<sup>10</sup>, argue that law and policies react slower compared to scientific and public knowledge, it is therefore crucial for legal interpretation to combine findings with the recognized rights to life and environmental safety and find extensive emissions to be punishable even if they are not explicitly prohibited (Marjanac and Patton 2018, 284). Despite previously denied cases and an obvious huge fight ahead, state attorney general in Rhode Island defends his strategy against ‘the big oil’, saying there is a fiduciary obligation to the taxpayers to hold oil companies accountable (pointing out the huge costs the state faces in order to implement appropriate and sufficient adaptation measures) and also a moral obligation to protect [...] and ‘put the planet before profits’ (Pett, Herald-Leader, and Group 2017, 10).

Additionally, issues that are taken to court gain public attention and the perception of their importance rises (Preston 2018, 13). Lawsuits are a method of action. By putting the victims in focus and giving them a voice to pronounce their burdens, Climate change becomes a tangible and relatable matter. Media coverage on environmental disputes becomes increasingly dense and runs through the whole political spectrum. The presentation of concrete cases and the portraying of (assumed) culprits also requests those who might not (yet) feel concerned and affected, to check their own moral estimation of the situation. When pollution is framed as a crime or breaking of the law, common value concepts, and thus the very basis of legislation and politics, becomes object of reevaluation.

The recent development in climate litigation shows on one hand the severity of the problem, as more and more people feel adversely impacted and threatened, indicated in a rising number of complaints filled (Grantham Research Institute 2017). On the other hand, it is hopeful to note that accountability is sought and fought for, supported by the advancement in science and the recognition thereof in courts, an increased learning curve through precedence cases and collaboration of scientists, lawyers, politics and the public (Business and Human Rights Resource Centre 2018, 1). It has been said, that lawsuits draw attention because of personal story telling, keeping more people interested in the cases and outcomes as opposed to tenacious policy

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<sup>10</sup> EarthClient is a charity founded by lawyers and environmental experts, who use their expertise to contribute to climate litigation and environmental protection.

negotiations behind closed doors. People have made climate change consequences ‘their own’ and want to be responsible for stepping in the deciding on the development of the path.

Primarily, Saúl is not asking for 20,000€ compensation but for rethinking of power structures and the prioritization of a ‘common future’ (Brundtland 1987). It has already been stated, that climate change, characterized as a *collective action issue* requires the commitment of various stakeholders in order to be solved successfully. While plaintiffs and pro-climate speakers interpret said fact as order for everyone to ‘do their share’, the major polluters approached try to stretch out the current moment of uncertainty and with it prolong the period of inaction. Despite this current unclarity, arguments from both, legal sides and climate science support the direction taken by Dr. Verheyen. Thus, a legal status, the ‘de minimis rule’, means that legal follow-up is only possible if the consequences to be foreseen are sufficiently serious. This legal restriction has been invalidated by climate science models and at last also been recognized in court (Higher Regional Court of Hamm 2017) The rule is a protection against a possible flood of lawsuits but foremost a norm for applying liability.

Individuals and their responsibility for damaging emissions has not been discussed in detail in this paper, but I think at this point it is helpful to consider the difference between individual and structural responsibility. Individuals as consumers can certainly exert some influence on the market, the approach to focus on large and powerful companies, however, implies a different normative reasoning (Baatz 2014, 10–12). Although climate plaintiffs certainly have their own case in mind, a change in the larger context is, however, a significant motivation in most cases as well. This means that inflicting responsibility for climate damage on companies should lead to a restructuring of resource- and market management. Ruggie's approach strongly appeals to companies to cooperate in order to achieve long-term rethinking and restructuring of investments and business decisions. He recognizes the strong position of companies and knows about the necessity to actively involve them in decisions under the given legal situation, hence the inclusion of self-monitoring and evaluation mechanisms.

#### Where do we stand today?

‘Our laws express what we believe in’ (Preston 2018, 14), and the mainstreaming of climate change, the multi-disciplinary approach fosters the strengthening of a democratic and empowering dealing with the issue. Chevron (part of the ‘big oil’ bunch currently sued by the state of Rhode Island, USA (Richardson 2018)) spokesperson on the other hand claims the use of lawsuits to be

‘neither honest nor constructive’, pointing towards difficult international policy issues that need to be solved in a different matter. Shell says that ‘lawsuits [...] impede the collaboration needed for meaningful change’ (Savage 2018).

Saúl could not have pursued his claim without the financial aid from richer countries. However, on the plus side, the international involvement in his case and others illustrates an understanding of collectivity, and thus the very nature of a collective and global action problem such as climate change. Germanwatch e.V. (the supporting NGO behind the lawsuit) emphasizes the necessity for a global climate solidarity system and more coherent international support as well (Weischer 2018). ‘Only the courts can save us now’, says Roger Cox lawyer of Juliana v. US case in his book ‘Revolution justified’(Cox 2012). His statement may be true at this moment, supported by both the number of court cases as well as the disregard of existing policy agreements. Nevertheless, the idea that after a victory of Saúl, all other 99.5% greenhouse gas emitters are also brought to court, is extremely difficult. Countless transnational procedures would start. On the one hand, these would again be time- and cost intensive, and on the other hand, a traceable and predictable legal situation must be created in order to provide security on the company side (for investors, stakeholders etc.) and for citizens.

Climate justice, with all its components cannot be up for dispute time and again. After researching and analyzing the relevant material on the topic of climate litigation, I understand that we are currently in a transition phase confronted with the reevaluation of societal values. This was preceded by an intensive scientific development, which created the necessary knowledge to comprehend environmental changes and consequences. Scientific research, resulting in reports such as the ‘Carbon Majors’ (Heede 2014) strengthens legal claims, allowing to assign shares of emissions to individual companies, thus giving the demand for accountability an argumentative ground. Furthermore, the knowledge about the dangers of GHG emissions cannot be denied any longer, a situation brought up in the recent ‘exxonknew’ debate, withdrawing an argument of the companies that hence no longer holds. The reports around the energy provider Exxon indicate how the company has actively misled the general public as well as their own shareholders, denying the impacts of GHG emissions on global climate change (Jerving et al. 2015). While in-house scientists investigated and lastly proved the connections of emissions and climate changes as early as 1981, information was withheld and aggressive promotion for fossil fuel energy continued instead. Such approaches are often compared to the tobacco industry. Here, too, the negative



effects of the products were initially covered up and denied. On the positive side, however, after the discovery and public denunciation of the practice, taxes were levied, and sales restrictions imposed (Center for International Environmental Law 2017). Despite the seemingly obvious attribution of guilt or at least of responsibility, cooperation is needed; *'these companies really need to be thinking about transition plans [...] they are a big part of the problem and they are a big part of the solution'*, says carbon major co-author Pedro Faria and thus indicates that factual responsibility is not synonymous with accountability (Gustin 2017). There is an interplay between legal and policy action noted, where they can mutually enforce each other. Most lawsuits are pointing out selective issues and cases, drawing on environmental policies and laws and thus demanding their review and interpretation. Apart from demanding particular measures in the respective cases, litigation is a tool of calling for policies to improve and update. Lawsuits can therefore be a driver for change as they constantly remind of the responsibility enforcement gaps. At the same time, the field of law is constantly developing as it is, however, with the interdisciplinary topic of climate change, various fields of law are collaborating with one another; as analyzed in this paper, environmental, human rights and business law.

#### Corporate responsibility

Ruggie's appointment has received wide support, both, through the unanimous recognition of the UN member states and furthermore through support from civil society and the private sector. Opponents, however, bring forward the criticism of the guideline representing the lowest common denominator and thus not truly achieving an advantageous situation for victims of rights violations (Sanders 2015, 6).

The discussion on defining *duties* in order to advance the questions on *responsibilities* and the distribution thereof has been shown. The underlying debate is based, on the one hand, on the classification of the two terms as legally binding or not legally binding and, on the other hand, on the classification of the dichotomy of rights and obligations. From a normative point of view, however, the irreconcilability of this relationship is contradicted: A duty to do something or not to do something does not necessarily have to be assigned to a right of another person. Here we can rely on Kant's definition of perfect and imperfect duties (Batz 2014, 11–14). I would argue that the imperfect duties, that is, those to which no concrete rights can be assigned, correspond to the human rights of the first generation. Their compliance is necessary in order to establish a certain environment. One could speak of minimum requirements of respect and protection.

Applying the HRBA to corporate responsibility in Ruggie's sense means acknowledging social expectations and deriving normative guidelines from them. Accordingly, patterns of responsibility develop, to which plaintiffs can refer and appeal to 'due diligence'. This 'binding -non-binding' character offers the possibility of reference as well as refusal in court. Ultimately, the UNGP are thus a summary of the given right, as well as a reminder of agreed principles, as well as the call for dialogue (GP 31(h)) (John G. Ruggie 2011, 34) . To date, companies have not been sufficiently represented in 'hard-law' because, on the one hand, voluntary corporate responsibility was assumed, and on the other hand, because the application of international law was reserved only for national states.

The relevance of the principles can be explained by two aspects. First, they make it possible to settle complaints by potential claimants in the context of human rights and thereby to give them some recognition. Secondly, the UN's intensive engagement with the guidelines, as well as the involvement of many stakeholders of different affiliations, reflects the social expectations driving the process.

The acceptance of the link between climate change and human rights and arising responsibilities for action regarding governments is described in detail in Knox' framework principles. Its practical application becomes visible in the increasing number of lawsuits against governments, as well as civil society movements, that claim their rights (Sabin Law Center 2018). While Saúl and his case receive moral and financial support from climate activists, the protests against RWE go much further. In the lignite mining area in the state of North Rhine-Westphalia in Germany, demonstrations have been going on for years against further mining of the raw material. Citizens and activists, and partly also politicians, want to bring about a final stop to coal mining (regional heute 2018). They refer (directly and indirectly) to the principles of climate justice, in particular to intergenerational justice and the concern that with 'business as usual' no habitable living space will be left for future generations (Ende Gelände 2019; RWE 2019).

#### Distributive justice

While the above-mentioned argument appears to be conclusive in the sense of future generations, the question of the rights and duties of presently living generations arises. And with this then the question of distribution mechanisms and, if necessary, the weighting and prioritization of rights. Climate change policies institute the greatest distributive task so far; an allocation key must be developed, which considers worldwide harms and benefits of actions and consequences for and

from past, present and future generations. These aspects are questions of intra- and intergenerational justice (Meyer and Roser 2006, 223–24). The realization of human rights grants all people the emission of (some) GHGs, as otherwise most rights could not be carried out (Baer 2002, 401). At the same time there is the relationship, which is core context of this paper, namely the emission of too much GHG which then causes rights violations. Evidently, it ought to be maneuvered in the balancing between responding to the right to fulfil ones needs without allowing an overshooting of emissions that then threatens the existence of humanity.

From the perspective of climate justice, therefore, distinctive problems and challenges emerge. The human rights violated through climate change are enshrined in the Human Rights Charter, but a precise quantifiable outline of obligations subsequent to those rights is not given. This means that codes such as 'a life in dignity', as per Principle 1 of the Conference on the Human Environment (UN Conference on the Human Environment 1972), or Knox' 'safe, clean, healthy and sustainable environment' (Knox 2018b), should ultimately be defined more precisely, or that the necessary resources would have to be categorized. The question therefore results in, how much resources are needed overall to be able to fulfill the rights of all people. In the previous parts of the text, I referred to the 2 °C target as suggested by scientific forums and adopted by UNFCCC, amongst others, but it remains the question of whether that goal is now 'fair', or rather to whom this aim serves justice and to whom it does not. There is a potential for individual rights competing with one another on an intragenerational level (Vanderheiden 2008, 73ff).

Additionally, it is to define who 'all people' includes. Respect for intergenerational justice is an important aspect of environmental justice as well (Bell 2011). Sustainability, as a cornerstone and means of achieving environmental protection, recalling Brundtland's definition; the respect of future generations and their needs. Thus, the group of those whose rights must be respected is extremely difficult to assess and the amount of resources needed is even more difficult to quantify (Brundtland 1987).

#### Ways into the future (?)

Many researchers agree that a solution to the climate problem can only be achieved by levying CO<sub>2</sub> taxes. While a detailed explanation of the operation of such a CO<sub>2</sub> emissions trading system would go beyond the scope of this work, the following can be referred to here: For the management of public goods, such as a (clean) environment, a tax system is interesting because it puts a prize on the value of the environment and would thus make its pollution a subject of charge. The

resource air or its pollution with GHG emissions would have to be paid. Although this internalization of external effects is a well-known method in economics, it has not yet been applied to environmental goods thoroughly. Ultimately, I think that the criticisms made, the lack of quantification of environmental protection, can be solved by this very approach. Most recently, William Nordhaus has been awarded the Nobel Prize for the development of this methodology and has once again given it particular power in connection with the recent IPCC report, which expressed the urgent need to act pro-environmentally (The Royal Swedish Academy of Sciences 2018; IPCC 2018). He emphasized that such a system is only really promising if it is used worldwide. According to critics, the existing European trading system is vulnerable to so-called 'carbon leakage', the relocation of production facilities and emission abroad. Companies are therefore not obliged to take responsibility for their entire production chain. I would argue here that the need for holistic approaches is clearly visible. Only by involving all actors, their perspectives and decision-making profiles, sustainable solutions can be created. The economic approach briefly outlined above will only then be feasible, as will all other possible approaches. The human rights approach, as has been extensively discussed, sets itself, at least theoretically, this undoubtedly high aim by observing substantial and procedural justice.

## 7. Conclusion

Climate change has evolved from being regarded as a purely environmental issue to a political one. It has been recognized that its impacts on one hand are affecting various aspects of human life and the full enjoyment thereof. Additionally, the enhancing effect on preexisting socio-economic conditions leading to disproportionate negative consequences for already vulnerable people. Professor Knox as Special Rapporteur on the issue of Human Rights and the Environment, dedicated himself to recognizing the impact of climate change on the full enjoyment of human rights. As part of his work, he broadly expanded the field of human rights. Climate change, now no longer just an environmental phenomenon, but a direct factor influencing the fundamental rights of e.g. life, water and food, has undergone a political reorientation. Linking the issues meant that environmental policies should always be conducted in an integrated way, considering human rights and human rights principles. The latter means the respect of environmental democracy, i.e. procedural justice; the possibility of participation in decision-making, co-determination, as well as

grievance mechanisms, in case of legal violations. Thus far, the stage of human rights, however, was dominated by state actors, which is due to their development in the state-citizen relation. Professor Ruggie, Special Representative on Business and Human Rights, put a new focus on the actor *businesses*. The result of his work is the three-pillar framework; *Protect, Respect and Remedy*. These, and the underlying guiding principles, represent the obligations of governments and companies in relation to human rights.

From the analysis of the intersection of climate change, human rights and business, it has become clear that the understanding of politics and law must be seen as a process-like development. The analysis of the two extensive frameworks, of Knox and Ruggie, has delivered two essential results. First, by focusing on rights infringements through climate change, plaintiffs are given a tool to approach injustices directly and concretely. Second, the obligation of 'due diligence' for companies puts businesses directly into relation with harm done and can therefore be used as supporting the argument of proximity and legal causation. There is not yet an active lawsuit applying human rights law against companies directly, however, the implicit usage thereof supports the path thereto.

I answer the question of corporate responsibility for human rights violations due to climate change therefore with the following comments: Man-made climate change is a socio-environmental phenomenon that acts as a catalyst for inequalities and existing power relations. At the same time, the recognition of inequalities and power relations, as well as the ensuing inclusion of human rights, has provided a well-established basis of rights and normative principles of law. This is now the basis for argumentation of climate complaints, as well as a space that could use the complex challenge of climate change as a momentum of change. The inclusion of companies takes account of their position of power, which means that conservative legal understandings based on outdated structures have adapted or adapted to the circumstances.

While the final verdict of Saúl's has not yet been decided upon until the date of completion of this work, in the specific case the following matters should be noted. The recognition of the court, in the second instance, a fundamental responsibility of RWE for global climate change, is already a remarkable achievement. Furthermore, the court has stated at its recent announcement that it recognizes the scientific models of the IPCC: the newly published (IPCC) report provides relevant arguments for the case. It is also made clear, for example, that the current limit of 2 °C warming in global mean temperature, could, from a climate justice perspective, be insufficient, in order to

guarantee a healthy environment for coming generations. Human rights, despite their lack of immediate enforceability for the business-actor, do provide a way to hold global actors accountable for their environmental responsibilities.

It is difficult to conclude which of the paths, voluntary mechanisms or a binding contract, will lead to better results. Nonetheless, the history of climate lawsuits is evolving rapidly and extensively. Individual plaintiffs, as well as collectives of people go to court to enforce climate justice. The implementation of climate justice is well receiving great public attentions. From a normative perspective, companies' responsibility is both recognized and increasingly demanded. The frameworks described in this paper suggest paths to hold companies responsible in court of law. The same argument, the broad and maybe even unspecific definition of human rights, that criticizes the HRBA can also be interpreted positively. While planetary boundaries and ecological tipping points cannot (yet?) be accurately calculated and thus cannot serve as a provider of numerical thresholds, the normative interpretation and application of human rights, along with its broadness, can adapt to our understanding of life and the environment and circumstances we want such life to take place in. Similar to the above discussed evolution of human rights in first, second and third generation, the understanding of rights, living space and constitution thereof has developed. Humankind, maybe youth increasingly, understands both, the need to act, as well as their potential scope and impact. Litigation, I argue, are, as well as other forms of environmental movements a sign of said potential influence applied.

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