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HOLDING BUSINESS ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS RELATED TO CLIMATE CHANGE

Curitiba, 2024

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Thesis presented to the Pontifícia Universidade Católica do Paraná (PUCPR), in the Postgraduate Law Programme (PPGD), Expertise: Socio-environmental Law and Sustainability, and to the Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), to the International Doctorate Program (IDP), as part of a cotutelle agreement, as partial requirement for obtaining the title of PhD in Law. This work was conducted with the support of the Coordination for the Improvement of Higher Education Personnel - Brazil (CAPES).

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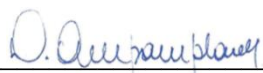
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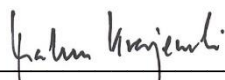
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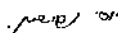
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"So why didn't the world end?"

Because people acted. A special kind of person, an optimist. Pessimists turn around and think, "Oh, well, let the world end anyway." The only ones who acted were those who thought that the future was going to be better than the present and that it was, therefore, worth all the work.

To be optimistic is to resist.

It's coming out of hiding, even if you know there's a dinosaur out there trying to turn you into a snack, because there are things that make it worth it.

What are yours?"

Translated by the author from the text "Boas notícias", Cris Dias

RESUMO

Apesar de o efeito estufa ser algo natural, que permite que o Planeta Terra mantenha condições climáticas para o desenvolvimento da vida como conhecemos, o excesso de emissão de gases de efeito estufa (GEE) antropogênicos (provocados pelo ser humano) tem resultado em um desequilíbrio. Resulta-se em alterações extremas e não naturais, ao que se denomina “mudanças climáticas”, o que significa não somente ameaça aos direitos humanos, mas também à própria existência humana em si. Embora as empresas contribuam para as causas do aquecimento global, por meio de atividades altamente emissoras de GEE, não são obrigadas a assumir a sua própria quota-parte de responsabilidade na emissão de GEE, nem são consideradas responsáveis pelas consequências e impactos das alterações climáticas. O trabalho explora a possibilidade de determinação da responsabilidade e responsabilização de empresas pelas violações de direitos humanos, relacionadas às mudanças climáticas. O problema de pesquisa delimitado, busca compreender, considerando que as empresas, por meio de suas atividades emissoras de gases de efeito estufa (GEE), contribuem consideravelmente para as causas das mudanças climáticas, seria possível, dentro do sistema normativo brasileiro, determinar a sua responsabilidade (*responsibility*) em mitigar a sua contribuição ou a sua responsabilização (*liability*) em reparar os danos dos impactos climáticos nos direitos humanos? A hipótese do projeto é que as empresas aceitam o risco climático quando se lançam em atividades econômicas altamente emissoras de GEE. Por isso, devem assumir a sua responsabilidade, e em último caso, serem responsabilizadas, pelos danos e violações de direitos humanos causados pelas mudanças climáticas. O trabalho irá analisar a existência dos aspectos jurídicos para a aplicação dos âmbitos preventivos (mitigatórios) e reparadores da responsabilidade, ou seja, a responsabilidade e responsabilização das empresas por sua contribuição para as causas das mudanças climáticas, em litígios climáticos. Para testar a aplicação prática destes conceitos, serão explorados casos emblemáticos propostos em outros países, já julgados ou em andamento. Se trata de uma pesquisa exploratória, a partir do método dedutivo, buscando uma solução do problema encontrado, qual seja a possibilidade de determinação da responsabilidade das empresas pelos impactos aos direitos humanos relacionados às mudanças climáticas. Será desenvolvido um monográfico, com pesquisa bibliográfica e documental, dedicando-se à uma análise da questão discutidas no âmbito internacional e nacional até o momento.

Palavras-chave: Direito Socioambiental; Sustentabilidade; Empresas e Direitos Humanos; Litígios Climáticos.

ABSTRACT

Although the Greenhouse Effect is a natural phenomenon, enabling Planet Earth to maintain climatic conditions for the development of life as we know it, anthropogenic (human-caused) excess greenhouse gas (GHG) emissions have resulted in an imbalance. The result is extreme and unnatural changes, known as "climate change," which threaten human rights and human existence itself. While companies contribute to the causes of global warming through high GHG emitting activities, they are not obliged to assume their share of responsibility for their emissions, nor are they held accountable for the consequences and impacts of climate change. The work explores the possibility of establishing corporate responsibility and liability for human rights violations related to climate change. This research problem seeks to understand: since companies, through their greenhouse gas (GHG) emitting activities, contribute considerably to the causes of climate change, would it be possible, within the Brazilian regulatory system, to determine their responsibility to mitigate their contribution or their liability to repair the damage caused by climate impacts on human rights? The project hypothesis is that companies accept climate risk when they engage in economic activities that are high emitters of GHGs. Therefore, they must assume their responsibility and ultimately be held liable for the damages and human rights violations caused by climate change. The work will explore legal aspects for applying preventive (mitigation) and restorative spheres of accountability, i.e., corporate responsibility and liability for their contribution to the causes of climate change, in climate litigation. To test the applicability of these concepts in practice, emblematic cases proposed in other countries will be explored, whether they have already been tried or are in progress. The research is exploratory, based on the deductive method, seeking a solution to the problem encountered, which is the possibility of determining the responsibility of companies for the impacts on human rights related to climate change. A monographic study will be conducted, with bibliographic and documentary research, analysing the issues discussed in the international and national spheres.

Keywords: Social and Environmental Law; Sustainability; Business and Human Rights; Climate Litigation.

ABSTRACT

Obwohl der Treibhauseffekt ein natürliches Phänomen ist, das es dem Planeten Erde ermöglicht, die klimatischen Bedingungen für die Entwicklung des Lebens, wie wir es kennen, aufrechtzuerhalten, haben die anthropogenen (vom Menschen verursachten) übermäßigen Treibhausgasemissionen zu einem Ungleichgewicht geführt. Das führt zu extremen und unnatürlichen Veränderungen, die als "Klimawandel" bekannt sind und nicht nur die Menschenrechte, sondern auch die menschliche Existenz selbst bedrohen. Unternehmen tragen zwar durch hohe Treibhausgasemissionen zu den Ursachen der globalen Erwärmung bei, sind aber weder verpflichtet, ihren Teil der Verantwortung für ihre Emissionen zu übernehmen, noch werden sie für die Folgen und Auswirkungen des Klimawandels zur Rechenschaft gezogen. Die Arbeit untersucht Möglichkeiten, die Verantwortung und Haftung von Unternehmen für Menschenrechtsverletzungen im Zusammenhang mit dem Klimawandel festzustellen. Das Forschungsproblem lautet: Da Unternehmen durch ihre Treibhausgasemissionen erheblich zu den Ursachen des Klimawandels beitragen, wäre es im Rahmen des brasilianischen Regulierungssystems möglich, ihre Verantwortung für die Minderung ihres Beitrags oder ihre Haftung für die Behebung von Schäden zu bestimmen, die durch die Auswirkungen des Klimawandels auf die Menschenrechte entstehen. Die Hypothese des Projekts ist, dass Unternehmen ein Klimarisiko eingehen, wenn sie wirtschaftliche Aktivitäten mit hohem Treibhausgasausstoß betreiben. Daher müssen sie ihre Verantwortung für die durch den Klimawandel verursachten Schäden und Menschenrechtsverletzungen übernehmen und letztlich dafür haftbar gemacht werden. Die Arbeit wird die rechtlichen Aspekte für die Anwendung der präventiven (Mitigation) und restaurativen Ebenen der Verantwortlichkeit, d.h. die Verantwortung und Haftung von Unternehmen für ihren Beitrag zu den Ursachen des Klimawandels, in Klimaprozessen untersuchen. Um die Anwendbarkeit dieser Konzepte in der Praxis zu testen, werden emblematische Fälle aus anderen Ländern untersucht, unabhängig davon, ob sie bereits verhandelt wurden oder noch im Gange sind. Die Forschung ist explorativ und basiert auf der deduktiven Methode, um eine Lösung für das Problem zu finden, wie die Verantwortung von Unternehmen für die Auswirkungen auf die Menschenrechte im Zusammenhang mit dem Klimawandel bestimmt werden kann. Es wird eine monografische Studie mit bibliografischen und dokumentarischen Recherchen durchgeführt, in der die bisher auf internationaler und nationaler Ebene diskutierten Themen analysiert werden.

Stichworte: Sozial- und Umweltrecht; Nachhaltigkeit; Wirtschaft und Menschenrechte; Klimaklagen.

LIST OF ACRONYMS AND ABBREVIATIONS

ADPF	Arguição de Descumprimento de Preceito Fundamental
BMW	Bayerische Motoren Werke AG
CIM	Interministerial Committee on Climate Change
CONAMA	National Environmental Council
DUH	Deutsche Umwelthilfe
ECCHR	European Centre for Constitutional and Human Rights
EIA	Environmental Impact Study
EPA	Environmental Protection Agency
GBG	German Civil Code
GHG	Greenhouse gases
IBAMA	Brazilian Institute of Environment and Renewable Natural Resources
ICAO	International Civil Aviation Organisation
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
JUMA	Law, Environment and Justice in the Anthropocene Research Group
MMA	Brazilian Ministry of the Environment
MPF	Brazilian Federal Public Prosecutor's Office
NDC	Nationally Determined Contribution
NGO	Non-Governmental Organisations
OECD	Organisation for Economic Cooperation and Development
PIUP	Energy and Industrial Processes
PNMA	National Environmental Policy
PNMS	National Policy on Climate Change

PUC-RJ	Pontifícia Universidade Católica do Rio de Janeiro
RIMA	Environmental Impact Report
RWE AG	Rhenish-Westphalian Power Plant
SCS	Social cost of carbon
STF	Federal Supreme Court
STJ	Superior Court of Justice
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Program
UNGP	United Nations Guiding Principles for Business and Human Rights
WMO	World Meteorological Organisation

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INTRODUCTION

Although the greenhouse effect is something natural¹, which allows Planet Earth to maintain climatic conditions for life to develop as we know it, the excess emission of anthropogenic greenhouse gases (GHG) (caused by human beings) has resulted in an imbalance, leading to extreme and unnatural conditions, known as "climate change". This poses a threat not only to human rights but also to human existence itself. A balanced environment is essential for guaranteeing a decent life, and climate change can result in scenarios that are prone to large-scale human rights violations, such as floods, droughts, and epidemics, which mainly affect the poorest populations².

Due to the urgency of the issue, adequate measures must be sought to prevent, mitigate, and adapt the causes and consequences of climate change. Therefore, it is in everyone's interest that the sources that could lead to such effects do not occur or that they are mitigated. Giddens Paradox³ describes that waiting for the damage of climate change to materialise and become visible before acting is, by definition, too late. Exemplifying this, in April 2022, the IPCC⁴ released a report explaining that effective measures to combat the climate crisis should be taken by 2025, as climate change would reach a critical state that would be difficult to reverse. In 2023, Antonio Guterres, Secretary General of the United Nations (UN), commenting on the summer heatwaves in the global north, declared that the "era of global boiling has arrived"⁵.

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Frequently Asked Question 1.3.:** What is the Greenhouse Effect?. Available at: [² ORGANIZACIÓN DE LAS NACIONES UNIDAS \(ONU\) CONSEJO DE DERECHOS HUMANOS. **Resolução n. n. 41/21 de 2019.** Los derechos humanos y el cambio climático. A/HRC/RES/41/21.](https://archive.ipcc.ch/publications_and_data/ar4/wg1/en/faq-1-3.html#:~:text=Much%20of%20this%20thermal%20radiation,temperature%20of%20the%20air%20inside; Accessed 10 Jul. 2023.</p></div><div data-bbox=)

³ GIDDENS, Anthony. 2010. A Política da Mudança Climática. Zahar, Rio de Janeiro.

⁴ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2022: Impacts, Adaptation, and Vulnerability.** Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. In the Press.

⁵ Statement made by Antonio Guterres, UN Secretary General, in light of the heatwaves in the Global North during the month of July. Source: UN. "Hottest July ever signals 'era of global boiling has arrived' says UN chief". Available at: <https://news.un.org/en/story/2023/07/1139162>; Accessed 15 Aug. 2023.

The concern about these impacts is familiar, and the approach to climate issues in international documents reached an important milestone in 1995, when the Kyoto Protocol⁶ was formulated. This document is a complementary treaty to the United Nations Framework Convention on Climate Change, which was devised at the Rio Convention in 1992. Although it does not explicitly address the responsibility of companies about the causes of climate change, according to the Protocol, the list of primary anthropogenic GHG emitting activities includes those related to industrial processes and energy (which provides for generation, transport, and industrial processes), connected to business activities.

In 2015, Paris hosted the 21st United Nations Climate Change Conference (COP-21) when the so-called Paris Agreement was signed, establishing that the signatory countries should endeavour to limit the temperature increase to 1.5°C above pre-industrial levels⁷. To achieve this goal, the signatory countries must commit to promoting actions aimed at reducing GHG emissions. Although the document does not lay down direct company responsibilities, States Parties are encouraged to establish favourable policies and incentives for adopting low-carbon activities. Every year, the goals and progress of the Paris Agreement are discussed at the United Nations Climate Change Conference (COP).

As part of the UN's formal expressions of opinion, in July 2019, the UN Human Rights Council adopted Resolution 41/21 on Human Rights and Climate Change⁸. This document emphasises that the effects of climate change have a series of direct and indirect consequences. It states that the changes caused by global warming lead to a climate imbalance that alters the flow of precipitation, the acidity of the oceans, droughts, and so on. All these changes can prevent human rights from being achieved, such as the right to food, clean water, and even the right to life. Furthermore, it recognises that because of climate change, the geography of some countries is threatened, which can

⁶ KYOTO PROTOCOL. Berlin, 1995. Available at: http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/Protocolo_Quito.pdf; Accessed 10 Jun 2023.

⁷ UNITED NATIONS (UN). **Paris Agreement**. 2015. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; Accessed 23 Jan 2024.

⁸ ORGANIZACIÓN DE LAS NACIONES UNIDAS (ONU). Comisión de derechos humanos. **Resolución n. n. 41/21 de 2019**. Los derechos humanos y el cambio climático. A/HRC/RES/41/21.

result in mass migration, both nationally and internationally, a type of migration that is not protected by any internationally recognised legal status⁹.

The Lancet Commission on Health and Climate Change¹⁰ highlighted in 2015 that climate change (and its many impacts) would be the leading cause of health problems among the world's population in the coming decades, ranging from issues caused by climate and temperature, such as respiratory and dermatological diseases, to new epidemics or pandemics. These impacts are cumulative, which can further aggravate a status of massive human rights violations. In other words, a place that already experiences water shortages and a lack of basic sanitation will suffer more intensely and find it more difficult to address health issues caused or exacerbated by climate change.

On 26 July 2022, the UN recently declared that the right to a safe, clean, healthy, and sustainable environment is a human right¹¹. This resolution also recognised that climate change poses severe threats to the ability of present and future generations to enjoy all human rights effectively. Events caused and intensified by climate change have devastating impacts on living conditions, threatening the future of children and adolescents, especially those in socio-economically vulnerable groups¹². Although this resolution is not binding, based on the definition presented by the UN in this paper, environmental issues will be addressed within the concept of human rights.

Globally operating companies develop as internationally integrated entities but are not subject to a single regulator¹³. Despite being among the main contributors to GHG emissions,¹⁴ companies do not have their activities regulated about climate issues

⁹ SARLAT, Rosália Ibarra. Indeterminación del estatus jurídico del migrante por cambio climático. **Anuario Mexicano de Derecho Internacional**, vol. XX, 2020, pp. 135-167 Ciudad de México, ISSN 1870-4654. p. 137-141

¹⁰ COSTELLO, Anthony; ABBAS, Mustafa; ALLEN, Adriana; et al. **Managing the health effects of climate change**: Lancet and University College London Institute for Global Health Commission. *Lancet*. 2009; 373: 1693-1733. p. 1693-1733.

¹¹ UNITED NATIONS (UN). **Resolution A/76/L.75 26/07/2022**. The human right to a clean, healthy and sustainable environment.

¹² BRITTO, Marcella Oldenburg Almeida. PIRES, Julia Stefanello. Mudanças climáticas e a atividade empresarial: o engajamento de jovens latinoamericanos em litígios climáticos. In: **Nuevas Voces. Contribuciones desde la Academia Latinoamericana para avanzar hacia una cultura de Conducta Empresarial Responsable y respeto por los Derechos Humanos**. Lima: OIT, Oficina Regional para América Latina y el Caribe, 2022. p. 123- 129.

¹³ RUGGIE, John Gerard. **Apenas negócios**. São Paulo: Planeta sustentável, 2014. p. 13

¹⁴ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2007:**

either. While they contribute to the causes of global warming, they are not obliged to assume their share of responsibility for GHG emissions, nor are they held responsible for the consequences and impacts of climate change.

In 2008, John Ruggie set out a framework called "Protect, Respect and Remedy", made up of the pillars of the State's duty to protect, the business responsibility to respect human rights (independent of state action), and the need for greater access for victims of violations to effective reparation for the damage caused¹⁵. These pillars led to the development of the UN Guiding Principles on Business and Human Rights (UNGPs), which present non-binding guidelines that can be voluntarily adhered to by companies without requiring a concrete counterpart. Krajewski¹⁶ explains that the configuration of current business relations often means that negative impacts on human rights are not caused by business activities inside a multinational company's network but within global supply chains. Attempts to address corporate responsibility in relation to human rights have, therefore, focussed on different types of business, and the value chains to which they relate.

The UNGPs do not specifically address climate or environmental issues. However, the document states that companies are responsible for respecting internationally recognised human rights, which includes not violating human rights and addressing any negative impacts their activities may cause¹⁷. Although no international treaty recognises a balanced climate as a human right, the UN has already expressed itself on the relationship between climate change, environmental issues, and the massive human rights violations resulting from the climate crisis, as discussed above.

Mitigation. Contribution of Working Group III to the Fourth Assessment. Report of the Intergovernmental Panel on Climate Change, Cambridge, Nueva York, Cambridge University Press, 2007. p. 449

¹⁵ RUGGIE, John Gerard. **Apenas negócios**. São Paulo: Planeta sustentável, 2014.

¹⁶ KRAJEWSKI, Markus. The State Duty To Protect Against Human Rights Violations Through Transnational Business Activities. **Deakin Law Review**. Vol. 23: Special Issue: 'Multinational Enterprises, Corporate Groups and Supply Chains in a Globalised World'. 2018.

¹⁷ UNITED NATIONS (UN). **Guiding Principles on Business and Human Rights**: Implementing the United Nations "Protect, Respect and Remedy" Framework. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 Jul. 2023.

These documents are voluntary and do not provide for sanctions for parties who do not respect their terms and principles. Although this voluntary nature is relevant in bringing the issue to the table, it is open to criticism since companies purely motivated by profit would not be obliged to adopt them¹⁸. Or, without proper monitoring, companies could make a symbolic public commitment without implementing these guidelines in their human rights governance.

Climate issues are becoming increasingly central to the discussion on preserving human and socio-environmental rights. However, actions established by the States' Legislative and Executive branches have not been sufficient to respond to this urgent issue. States' difficulty in reaching consensus on targets and actions related to climate issues is an indicator of this failure. As a result, the Judiciary has emerged as an ally in the fulfilment of domestic and international standards on the environment, using legal actions brought by public and private entities, known as climate litigation. Climate litigation is growing in prominence as a means of enforcing commitments related to human rights and climate issues, especially when it involves discussions about the role of companies in climate commitments.

Establishing the company's responsibility and liability are issues that can be involved in such litigation, where they can be compelled to adopt preventive measures, and obliged to repair damage caused by climate change. These legal theses will be explored in this the second and third chapters. Since 2015, climate litigation cases have steadily increased around the world. Although governments are still the most common defendants, appearing in just over 70 per cent of all global cases, there has been a significant increase in cases against companies¹⁹.

Since the 1988 Federal Constitution, Brazil has established different environmental protection instruments, including the prevention principle. Despite

¹⁸ PAMPLONA, Danielle Anne. SILVA, Ana Rachel Freitas da. Os princípios orientadores das nações unidas sobre empresas e direitos humanos: houve avanço?. In: BENACCHIO, Marcelo (coordenador), VAILATTI, Diogo Basílio. DOMINQUINI, Eliete Doretto (organizadores). **A sustentabilidade da relação entre empresas transnacionais e Direitos Humanos**. Curitiba: CRV, 2016.

¹⁹ SETZER, Joana. HIGHAM, Catherine. **Global Trends in Climate Change Litigation: 2022 Snapshot**. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

the progressiveness with which Brazilian legislation addresses environmental protection, it does not cover climate issues. When the offending action is perpetrated by a business, but the law only defines obligations for the state, there is a particular challenge in demanding that businesses respect regulations that do not directly affect them.

In Brazil, the topic has yet to be explored to its full potential, and these regulations are usually centred on the State's responsibility to comply with or regulate climate laws. It was only in 2020 that the issue reached the Federal Supreme Court (*Supremo Tribunal Federal*, STF), when the case called Argument for Failure to Comply with a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental*, ADPF) case number 708 was heard. The ruling argued over the government's management of the National Fund for Climate Change (*Fundo Clima*). The decision is a landmark, since the rapporteur of the case, Minister Luis Roberto Barroso, recognised in his ruling that "treaties on environmental law constitute a species of the genre of human rights treaties"²⁰. The impacts of this decision will be discussed in greater detail in the second chapter.

On 30 March 2022, the so-called "Green Agenda" trial began at the STF, condensing, for the first time in the country's history, seven lawsuits involving environmental issues, some of them dealing with climate disputes²¹. However, none of them addressed the corporate role in the greenhouse effect. According to the Climate Litigation Platform in Brazil of the Law, Environment and Justice in the Anthropocene Research Group (JUMA) of the Pontifícia Universidade Católica do Rio de Janeiro (PUC-RJ)²², by January 2024 there were only 31 lawsuits involving companies. None of these lawsuits dealt with the companies' accountability for impacts on human rights related to

²⁰ Translated by the author from the original: "tratados sobre direito ambiental constituem espécie do gênero tratados de direitos humanos". Source: SUPREMO TRIBUNAL FEDERAL (STF). **ARGUIÇÃO DE DESCUMPRIMENTO DE PRECEITO FUNDAMENTAL (ADPF) 708**. Brasília, Distrito Federal. 04/07/2022. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15353796271&ext=.pdf>; Accessed 15 March 2024.

²¹ As can be seen in the agenda published in the Electronic Justice Bulletin (DJe) n. 37/2022, from 24 February 2022. Available at: https://www.stf.jus.br/arquivo/djEletronico/DJE_20220223_037.pdf; Accessed 01 Feb. 2024.

²² The Climate Litigation Platform in Brazil can be accessed on the website: <https://www.juma.nima.puc-rio.br/base-dados-litigancia-climatica-no-brasil>.

climate change, which indicates a significant lack of discussion on this topic in Brazil, given that climate impacts are already occurring. On the international stage, there has been a substantial increase in cases with a strategic ambition, i.e., to bring about broader social change²³. These cases can set new paradigms for establishing climate accountability.

In climate litigation brought against companies, recent cases have argued that the role of corporate accountability can be addressed from two perspectives: (i) responsibility, based on a duty of care, to mitigate their contribution to the causes of climate change or (ii) liability, with an obligation to repair the damage related to climate change, recognising the causal link between climate impacts and the contribution of corporate activity to the intensification of global warming. This study goal is to analyse these two arguments used in climate litigation against companies. However, the study does not aim to explore the formal aspects of this type of litigation²⁴; it just asks questions of material law and seeks to develop a concept of climate responsibility and liability. Countries like Germany and the Netherlands have had interesting judicial debates exploring existing rules and ideas for classifying climate responsibility and liability. Although this is not a comparative study, these emblematic cases will be explored to understand the interpretation of the petitioners and court judges and extract advances that could be explored in Brazil.

The research question is: given that companies, by engaging in greenhouse gas (GHG) emitting activities, contribute considerably to the causes of climate change, is it possible, using legal instruments already established in the Brazilian regulatory system, to establish corporate responsibility to mitigate their contribution to climate change and/or to establish civil liability to repair the damage suffered as a result of climate impacts on human rights?

²³ SETZER, Joana. HIGHAM, Catherine. **Global Trends in Climate Change Litigation: 2022 Snapshot**. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022.

²⁴ Issues such as the legitimacy of the parties, admissibility criteria, legal remedies and other procedural aspects will not be analysed.

While in English, there are different names for the terms accountability, civil liability, and responsibility, in Portuguese, all these expressions are translated as "*responsabilidade*". Curzi points out that the terms have been used in different ways in the field of Business and Human Rights. The gap between the terms in English and their translation into other languages, such as Portuguese, is one of the reasons for this inconsistency in defining the terms²⁵. According to the Oxford English Dictionary²⁶, accountability is related to the possibility of being held accountable or responding for responsibilities and conduct. For Bernaz²⁷, the term refers to a broader and more flexible concept of responsibility and is not limited to the applications of legal obligation. Liability refers to a legal obligation covering criminal, civil, or administrative aspects²⁸. This study will look at civil liability, the legal denomination provided by the Brazilian Civil Code, which can be applied from an unlawful act that causes damage to third parties. On the other hand, responsibility refers to a duty of care, a preventive duty. In this study, accountability will be used to encompass these two aspects.

The hypothesis is that companies accept climate risk when they engage in economic activities that are high emitters of GHGs. Therefore, they must assume their responsibility and ultimately be held liable for the damages and human rights violations related to climate change. Based on the principles of environmental law and the open concepts of civil law, as well as developing conceptual frameworks presented in emblematic climate litigation cases brought against companies in other countries, this study takes the following ideas as a starting point: (i) the Brazilian legal system already has the necessary instruments and grounds for courts to require companies to take preventive measures to avoid climate change or mitigate their contribution to the causes of climate change; (ii) if they fail to take preventive measures, the Brazilian legal system already has the necessary instruments and grounds for holding companies legally liable for the damage related to climate change as a result of their greenhouse gas emissions.

²⁵ CURZI, Ludovica Chiussi. General Principles for Business and Human Rights in International Law. Queen Mary Studies in International Law, Volume: 43

²⁶ The Oxford English Dictionary. 2nd edn. 1989, Oxford: Clarendon Press.

²⁷ BERNAZ, Nádia. Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion? **Journal of Business Ethics**, 2012.

²⁸ CURZI, Ludovica Chiussi. General Principles for Business and Human Rights in International Law. Queen Mary Studies in International Law, Volume: 43

The thesis aims to identify, within the Brazilian legal system, the legal mechanisms that could make it possible to establish companies' responsibility for mitigating their GHG emissions or to hold companies liable for the damage they caused by contributing to climate change, bearing in mind the consequences and impacts on human rights. Paradigmatic cases in Germany²⁹, the Netherlands,³⁰ and Switzerland³¹ will be explored to achieve this. Notably, corporate accountability actions in Germany have taken centre stage in the climate debate, becoming an essential study object for the progress of debates in other locations. In the Brazilian legal context, the German influence on the historical development of Brazilian laws, mainly its civil law, is a significant factor³².

This study's scope is restricted to studying current norms and exploring new paradigms for existing concepts. Although norms³³ and an international treaty³⁴ on Business and Human Rights are under discussion, this study does not intend to cover them in detail.

Responsibility or civil liability will be analysed based on the UNGPs guidelines and from a business and human rights perspective. This means that companies' responsibility must consider the risks and impacts on people, not just on the business.³⁵

²⁹ Cases analysed: Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW) (2021); Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG (2021); Kaiser, et al. v. Volkswagen AG (2021) e Luciano Lliuya v. RWE AG (2015).

³⁰ Cases analysed: Milieudefensie et al. v. Royal Dutch Shell (2019).

³¹ Cases analysed: Asmania et al. vs Holcim (2021).

³² LOMBARDI, Gabriela Back; COVOLAN, Fernanda Cristina. Direito Civil Alemão no Brasil do Século XIX: Teixeira de Freitas e a Escola Histórica Alemã. In: **R. Opin. Jur.**, Fortaleza, ano 20, n. 33, p.202-231, Jan/abr. 2022.

³³ One example of this is the Brazilian Draft Bill 572/2022 proposed in 2022, which is intended to create a national framework law on Business and Human Rights and to establish guidelines for promoting public policies in this area.

³⁴ On 26 June 2014, the UN Human Rights Council adopted resolution 26/9, in which it decided to "establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". Available at: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>; Accessed 10 Jan 2024.

³⁵ UNGPs understands human rights risks as potential adverse impacts on human rights by the company. Source: UNITED NATIONS (UN). **Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework**. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 Jul. 2023.

Generally, traditional business risk analysis focuses on financial risks, reputational risks or other factors related to traditional business risk analysis. This responsibility requires risk management that goes beyond this traditional approach.

Within this scope, the research is structured in four parts. The first part will seek to understand the concept of climate (in)justice, establishing a parallel between the causes and consequences of climate change, how business activity contributes to its escalation, and how it can become liable for its responsibility to mitigate the causes or be held responsible for repairing the damage. The first chapter will outline climate justice concepts, which will serve as a basis for further study of the subject in the second and third chapters.

The second chapter will explore the enforceability of corporate responsibility based on environmental law's principles of prevention and precaution and civil law's duty of care. It will explore the nexus between GHG-emitting activities and climate change and companies' public commitments to respect human rights. In line with the methodology outlined in the first chapter, the structure of paradigm cases brought against companies in other countries will be analysed.

In the third chapter, the applicability of civil liability for climate change-related damage will be explored, centred on the nexus between GHG-emitting activities and the causes of climate change. Environmental damage is considered an intolerable risk to human rights or intergenerational equity. Then again, the structure of cases theorising their applicability will be analysed, as outlined in the first chapter.

The premise of this study is that companies are not the only ones to contribute to the causes of climate change and that the production of risks does not (necessarily) occur in the place where the impacts are felt. Establishing this responsibility and/or accountability for impacts on human rights and establishing the causal link between business activities and climate damage is a challenging task for the thesis. However, even though there are limitations, and this is a new path to tread, it is necessary to seek these answers. At least so that the gaps to be overcome can be presented. Realising the

peculiarity of this configuration, the concepts, ideas and standards used in the second and third chapters will be explored from a climatic perspective.

From the findings of the second and third chapters, the fourth chapter proposes a framework for implementing the conclusions on the theoretical possibilities for determining, in the Brazilian regulatory context, the responsibility of companies for mitigating the causes and being held liable for damages in cases of human rights violations related to climate change.

This exploratory monographic study uses bibliographic and documentary research to analyse climate litigation against companies in national courts³⁶. It centres on cases that have been emblematic on the Brazilian and international scene since 2011, the year the UNGPs were adopted. It observes how the gap between businesses' responsibility and/or accountability for their contribution to GHG emissions has been addressed.

The cases will be examined under the following comparative points: (i) who the plaintiffs and defendants are; (ii) where the litigation was filed; (iii) the competence of the court in which it was filed; (iv) the international norms used in the lawsuits; (v) the concepts and structures used to shape the idea of climate responsibility and/or liability; (vi) the human rights implied; (vii) the theories of justice presented and, in cases where the courts have spoken, (viii) the position of the court within the criteria listed above.

Critical discourse analysis³⁷ will be used as the methodology, applying it to the legal and normative context³⁸ and understanding existing norms from a climate perspective and the need to adapt language and concepts to the issue's urgency. In abstract terms, the discourse refers to language as a social practice³⁹, which, in the context of the climate emergency, can point to changes or attempts at change in the conceptual construction and application of existing norms or commitments already made within a given context.

³⁶ Cases and debates held in regional courts will not be analysed.

³⁷ DIJK, Teun. **Handbook of Discourse Analysis**, vol. 1. New York: Academic Press, 1985.

³⁸ GELLERS, Joshua C. Gellers. **Greening Critical Discourse Analysis**. Critical Discourse Studies, 2015.

³⁹ SUSAN, Elliot. **A Call for Justice: A Critical Discourse Analysis of Climate Justice at the COP26**. 2022. Master thesis in Sustainable Development at Uppsala University, No. 2022/20, 46 pp, 15 ECTS/hp. P 14.

Climate litigation cases with strategic ambitions⁴⁰ are increasing. They may be those cases in which the plaintiffs aim to bring about broader social change - such as advancing climate policies, creating public awareness, or shaping the behaviour of government and corporate actors. Understanding that these objectives transform climate litigation into a way of achieving a final judgment and, above all, creating new paradigms and spotlighting the need to adjust to the climate emergency.

While legislation speaks in the general language of politics, in litigation, the implications of legal provisions are critically examined as they apply to the practicalities of real life⁴¹. Strategic human rights litigation, including climate litigation, can achieve its goals and be a success if it impacts traditional ways of understanding the issue under debate, even when dismissed.

The study should establish some of the theoretical definitions that will guide this work: when mentioning "human rights", this study is referring to the concept set out in the UNGPs⁴², principle 12 of the second pillar. This refers to internationally recognised human rights, including at least the rights expressed in the International Bill of Human Rights⁴³ and the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work.

For climate change, the definition of the United Nations Framework Convention on Climate Change will be used, which states:

"Climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.⁴⁴

⁴⁰ SETZER, Joana. HIGHAM, Catherine. **Global Trends in Climate Change Litigation: 2022 Snapshot**. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. 2022.

⁴¹ OPEN SOCIETY JUST INITIATIVE. **Strategic Litigation Impacts: Insights from Global Experience**. 2018.

⁴² UNITED NATIONS (UN). **Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework**. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 Jul 2021.

⁴³ The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

⁴⁴ UNITED NATIONS (UN). **United Nations Framework Convention on Climate Change**. 1992.

The document's definition of emissions also will be used: "(...) the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time"⁴⁵. The term greenhouse gases (GHG) refers to gases "(...) constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation,"⁴⁶ contributing to the greenhouse effect in this process. This study does not attempt to discuss the term scientifically; instead, it relies on the concept's consolidation in international instruments based on specific climate studies.

Regarding climate litigation, the concept must fulfil two criteria defined in the Global Climate Litigation Report: firstly, it must have been brought before judicial bodies. Secondly, the law, policy, or science of climate change must be a material issue or fact in the case⁴⁷. Even in cases where it is not the central issue, the climate issue must be clearly addressed and developed in such a way that it is relevant for the construction of the action's arguments. Cases that do not address climate aspects, even if they deal with risks and impacts related to climate change, will not be considered.

Even if there are different names for accountability, responsibility, and liability in English, it should be noted that other languages do not have this distinction. In Portuguese, all three terms are translated as "*responsabilidade*". As a consequence, it is a challenge to establish this distinction clearly. Regarding responsibility, this study aims to understand how the business climate responsibility is developed, which has also been defined as the "corporate duty to mitigate emissions"⁴⁸. It is a preventive duty to

Available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; Accessed 05 Mar 2022.

⁴⁵ UNITED NATIONS (UN). **United Nations Framework Convention on Climate Change**. 1992. Available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; Accessed 05 Mar 2022.

⁴⁶ UNITED NATIONS (UN). **United Nations Framework Convention on Climate Change**. 1992. Available at: https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; Accessed 05 Mar 2022.

⁴⁷ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP). **Global Climate Litigation Report: 2023 Status Review**. 2023. Nairobi. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3; Accessed 05 Dec 2023.

⁴⁸ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP). **Global Climate Litigation Report: 2023 Status Review**. 2023. Nairobi. Available at:

avoid contributing, or reducing their contribution, to the causes of climate change. It is linked to the legal determination of liability, which can be understood as abstaining from causing damage⁴⁹. Such responsibility can also be drawn from well-established environmental principles. This concept will be explored in the second chapter and apply it to the Brazilian regulatory framework in the fourth chapter.

Liability, on the other hand, generally establishes a duty "to" or "in respect of" another person, so whenever liability is being discussed, the corresponding rights must also be considered⁵⁰. Civil liability refers to damage caused to someone else's rights. Applying this concept in the context of the climate emergency will be explored in the third chapter, and obligations arising from national rules, from Brazil, and from the countries with paradigm cases under analysis will be addressed. Embracing the two aspects of responsibility and liability, the term "climate accountability" will be employed. This study will not focus on understanding accountability from the perspective of international treaties or contractual agreements nor will it address the applicability of these concepts to other actors that may contribute to the causes of climate change, such as states, but it will focus on assessing business responsibility and liability. The fourth chapter will consolidate these concepts in the Brazilian legal scenario.

The preventive and reparatory aspects are part of the accountability concept. This responsibility and liability are a category of civil law related to "the need to comply with obligations previously established in legal transactions, rules or principles"⁵¹. The need to meet obligations can be applied both before the legal duty is breached - here, the preventive aspect is treated as climate responsibility (duty to mitigate) - and after the damage has been done, holding the perpetrators liable to repair the impacts.

https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3; Accessed 05 Dec 2023.

⁴⁹ BRUNNÉE, Jutta. GOLDBERG, Silke. LORD, Richard. RAJAMANI, Lavanya. Overview of legal issues relevant to climate change. In: **Climate change liability**: transnational law and practice / [edited by] Richard Lord ... [et al.]. Cambridge University Press, New York, 2012.

⁵⁰ BRUNNÉE, Jutta. GOLDBERG, Silke. LORD, Richard. RAJAMANI, Lavanya. Overview of legal issues relevant to climate change. In: **Climate change liability**: transnational law and practice / [edited by] Richard Lord ... [et al.]. Cambridge University Press, New York, 2012.

⁵¹ BONNA, Alexandre Pereira. **Punitive damages (Indenização Punitiva) e os danos em massa**. Rio de Janeiro: Lumen Juris, 2015. p. 22.

This study will explore UNGPs guidelines, particularly on the business responsibility to respect human rights. As outlined above, the guidelines will be used to understand companies' accountability. However, it is important to highlight that the "responsibility" set out in the UNGPs is not a legal obligation. In other words, it should be understood that its standards and conditions, although not legally binding, can be used to shape how the legal norm is applied.

Through exploratory research and a critical discourse analysis methodology, this study attempts to understand the conception of these legal terminologies in the context of climate litigation, using the following steps: (i) their classic concepts within national environmental and civil law will be presented, delimiting the limits of their applications in climate issues; (ii) in the analysis of paradigmatic cases of international litigation, the discourse in the construction and application of these terms in the idea of climate responsibility and/or liability will be explored, finally, (iii) a comparative analysis of these discourses will be made for application within the Brazilian normative and practical reality, pointing out the specificities of the national context and which paths could be explored in building this new paradigm.

CHAPTER 1: CLIMATE JUSTICE: HUMAN RIGHTS VIOLATIONS RELATED TO CLIMATE CHANGE

"Everyone has the right to an ecologically balanced environment, an asset of common use to the people and essential to a healthy quality of life, imposing on the public authorities and the collectively the duty to defend and preserve it for present and future generations."⁵²

(Brazilian Federal Constitution of 1988)

An increasing number of social problems are caused or compounded by environmental issues. Polluted rivers, destruction of water sources, fires, natural reserve degradation, etc., affect the communities that depend directly and indirectly on the existence of a healthy and balanced environment. Enjoying a healthy environment that guarantees an existential minimum is essential for human beings to enjoy their freedoms and rights. The absence of this basic level of preservation, especially when imposed by the actions of third parties, removes the individual from a situation of justice. In other words, climate issues cause and intensify environmental and human rights impacts in this context.

Although John Rawls does not explicitly address the climate perspective in his theory, it is possible to draw parallels between the principles defended by the author and the strengthening of the debate on climate issues. The focus of this study is to address these aspects of climate justice, understanding that it is part of a bigger picture: the environmental context. Starting from Rawls' idea of justice as equity and the perception that, under the veil of ignorance of the original position, the principles of justice chosen would consider some primary goods, among which would be fundamental rights and freedoms, debates arise as to how the right to the environment and climate justice would fit into Rawls' theory. The author is called upon to strengthen the development of the theory of climate justice, understanding the climate issue as an aspect of the environmental issue.

Different analyses can be made regarding the term climate justice from the perspectives of law, philosophy, and even relations between human beings. This chapter focuses on how climate justice is conceived in Rawls' theoretical framework. It aims to

⁵² Translated by the author.

demonstrate how the climate issue is necessary to meet the principles of justice and, therefore, the ideal formulated behind the veil of ignorance.

Climate justice is connected to environmental justice and is closely linked to social inequalities and intergenerational rights. The term "environmental justice" emerged in conjunction with the struggle for civil rights and the realization that waste and toxic substances tended to be deposited in poor areas. Environmental degradation and threats were caused by social inequalities while strengthening them⁵³. In the climate context, the term aims to understand and establish measures to correct the unequal distribution of responsibilities and impacts related to climate issues.

The uneven distribution of these impacts and the creation of threats will be analysed based on Ulrich Beck's theory of the risk society. He points out that risks are distributable and can also configure positions, such as threat or class, which can contribute to environmental injustices and the intensification of inequalities. Massive investments in high GHG emitting technologies, while places more susceptible to climate impacts struggle to implement adaptation measures, accurately represent this unequal distribution.

From the theories presented by Rawls and Beck, thoughts and an interpretation of climate justice will be carried out from a human rights and freedoms perspective based on the benefits and interests of human beings. It is understood the existence of a climate perception that goes beyond human experience. Even though theories of environmental justice aim to encompass a conception of justice beyond the human species, this will not be the subject of this discussion.

The chapter aims to analyse the concept of climate justice and the right to the environment and to a healthy climate, considering Rawls' ideas. These rights are qualified as fundamental rights and are, therefore, incorporated into the development of the principles of justice. To do so, it will first look at Ulrich Beck's ideas on the unequal distribution of risks and the resulting climate injustice.

⁵³ ACSERALD, Henri. **O que é justiça ambiental**. Rio de Janeiro: Garamond, 2009.

1.1. Unequal distribution of climate risks

The present society that can be defined as a "risk society". The term, first coined by Ulrich Beck, refers to how the causes and consequences of environmental degradation risks are at the heart of modern society. In this concept, one must bear in mind that risks are objects of distribution, just like wealth, and can also constitute positions - "risk positions or class positions"⁵⁴. Although the risk society does not present the same issues as a social class society, the distribution of risks can accentuate inequalities, although not necessarily.

Before this research explores how risks are assessed, there is a need to think about the causal link and the cause itself. Firstly, the causal link is between actual or potential harmful influences. This means a broad relationship, where everything can be connected to everything. However, even in the face of that even in "the incalculable profusion of individual interpretations, individual conditions are again and again related to each other"⁵⁵.

When talking about cause, one must reflect that "every socially recognized 'cause' comes under massive pressure for change, and with it, the system of action in which it originated"⁵⁶. The risk relation therefore essentially has a future component, an anticipation, "with destruction that has not yet happened but is threatening, and of course in that sense risks are already real today"⁵⁷. The past no longer has any power over the present, and the future takes its place. The damage, consequently, has not yet materialized, but depending on the risks taken, the threat makes it something almost tangible. It is also important to highlight the role of the perpetrator, who takes on the risk of the cause by engaging in a certain activity.

⁵⁴ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 26.

⁵⁵ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 31.

⁵⁶ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 32.

⁵⁷ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 33.

Beck's theory of the risk society reveals the complex factors involved in the analysis of this society, which distances itself from, and at the same time uses, class divisions and the distribution of wealth. The risk analysis involves political, social, scientific, and cultural issues that further complicate the approach to preventive or mitigating measures for these risks.

A key point is that once these risks are tangible, they can no longer be undone. Their impacts are also transboundary, and it is not possible to clearly determine who will suffer from their consequences, as is the case with global warming. The theory therefore presents us with a different perception of what is normally understood in the legal world. When applying norms, to say that someone "accepts the risk" refers to the likelihood of the result happening, while in the risk society, the risk assumption refers to the acceptance that the result will inevitably happen. Understanding the unequal distribution of climate risks is therefore essential to establish a climate justice concept, and how this perspective can be considered under Rawls' theory.

According to Aristotle, justice is the first virtue of political life. Virtue is understood as the "(...) sense that generates obedience to certain norms"⁵⁸, requiring prior agreement on the norms, which is emphasized in the case of justice. Justice is sometimes discussed in relation to questions of equality, or fairness, as Rawls argues. However, even the author, who admits the existence of inequalities without there being injustice, understands that inequality that causes harm cannot be accepted in the idea of justice. This is where the question of the existence of environmental justice arises.

Before going deeper into the climate justice discussion, one needs to first understand that this concept is closely linked to the debates on environmental justice. The unequal distribution of the consequences of environmental degradation is not new; reports indicate that sewage and garbage facilities in poorer areas date back to Antiquity⁵⁹. It wasn't until the 1980s that an environmental justice movement was strongly articulated

⁵⁸ Translated by the author from MACINTYRE, Alasdair. **Depois da Virtude**. Tradução de Jussara Simões. Bauru: EDUSC, 2001. p.410.

⁵⁹ ACSERALD, Henri. **O que é justiça ambiental**. Rio de Janeiro: Garamond, 2009. p. 53.

in the United States, expressly linking the connection between environmental degradation and social injustice. Since the 1960s, the African descent civil rights movement had been linking environmental degradation to social inequalities⁶⁰, at which time the concept of environmental justice was born, a concept from which emerged the debate on climate justice. At the time, it was noticed that poor areas, mostly inhabited by black people, served as a dumping ground for garbage and toxic products.

Environmental justice is not only closely related to social issues and basic rights, but it is also linked to a social movement for civil rights and the confrontation of inequalities created from racist conceptions. Climate justice emerges from the same concerns, understanding that climate causes and impacts are even more transnational. Understanding the origin and importance of the term is vital to relate it to the ideals of social justice set out by Rawls. Racism, like other types of discrimination, causes inequalities that prevent the concept of justice from being achieved. It is clear that the imposition of environmental degradation and the impacts of climate change not only accentuate these prejudiced structures but are also caused by them. This point will not be discussed in all its complexity. Still, it is mentioned only to illustrate the relationship between environmental issues and social causes, which is extremely important for the construction of social justice.

When looking at environmental issues and how they are closely connected to social issues, one must understand how access to the environment, and especially to a healthy and sustainable environment, is essential for social equity. The common thing, shared by all citizens, are the goods considered to be the conditions for a good life, but "what are the goods considered to be the conditions for a good life for all?"⁶¹.

There is no definitive answer, because "not all goods seen as the conditions for a good life for all, or having an intrinsic value for all, are things that 'we commonly share'"⁶². In this sense, publicly shared goods are ideals, aiming to guarantee, at best,

⁶⁰ CICHELERO, César Augusto. NODARI, Paulo Cesar. CALGARO, Cleide. Justiça e o direito fundamental ao meio ambiente. In: **Opini3n Jurídica**, 17 (34) • julho-diciembre 2018 • pp. 171-189 • ISSN (en línea): 2248-4078^a. p. 174.

⁶¹ Translated by the author from: HELLER, Agnes; FEHÉR, Ferenc. **A condiç3o política pós-moderna**. Traduç3o de Marcos Santarrita. 2. Ed., Rio de Janeiro: Civilizaç3o Brasileira, 2002. p. 119-120.

⁶² Translated by the author from: HELLER, Agnes; FEHÉR, Ferenc. **A condiç3o política pós-moderna**.

socio-political conditions for the good life of all, and not all the conditions of that life. In addition, these conditions must be socio-environmental and political.

When one seeks climate justice, it must remember that the right to a healthy environment, with favourable climatic conditions, must also be considered a minimum, fundamental right. Not in the legal sense, but as basic standards. Even if there are variations in temperatures, flora and fauna, or climatic conditions in each region, to ensure that there are conditions for life, there is a need to prioritize the maintenance of an environment that is propitious for it. In any geographical context, a dry river due to high temperatures and lack of rainfall does not provide fishing conditions or a drinking water supply that serves the local population, so it is unable to provide its own living conditions. Similarly, excessive rainfall has consequences for access to housing, safety and the spread of disease. The extremes caused by climate change either prevent or intensify inadequate conditions for maintaining this environment.

Environmental justice "(...) addresses discrimination based on belonging to a social minority and the consequent environmental repercussions"⁶³, going beyond the discussion of sustainability and ecology. In this climate crisis context, there are also questions about maintaining basic rights and minimum conditions for human life. It is therefore linked to the preservation of an ecosystem that does not intensify social inequalities and, furthermore, enables them to be reduced. It goes one step further than environmental justice, understanding that climate issues have particularities that must be addressed. Both in the contribution of the causes and in the distribution of the impacts.

The discussion on access to water can be used as an example. Access to drinking water was recognized in 2020 by the UN as essential to life with dignity and "a component of the realization of all human rights"⁶⁴. According to the UN report on the

Tradução de Marcos Santarrita. 2. Ed., Rio de Janeiro: Civilização Brasileira, 2002. p. 121.

⁶³ Translated by the author from: CICHELERO, César Augusto; NODARI, Paulo Cesar. CALGARO, Cleide. Justiça e o direito fundamental ao meio ambiente. In: **Opinião Jurídica**, 17 (34) • julio-diciembre 2018 • pp. 171-189 • ISSN (en línea): 2248-4078^a. p. 174.

⁶⁴ UNITED NATIONS (UN). **Resolution n. 64/292**. The human right to water and sanitation. Resolution adopted by the General Assembly on 28 July 2010. Available at: <https://documents.un.org/doc/undoc/gen/n09/479/35/pdf/n0947935.pdf?token=nC2BI8YVbpDSiriEKI&f e=true>; Accessed 20 Jul 2022.

Sustainable Development Goals, in 2019 more than 733 million people are living in countries with high or critical levels of water stress. If this figure remains unchanged, more than 1.6 billion people will suffer from a lack of safe drinking water⁶⁵. For these people, access to clean and safe drinking water is an essential element in guaranteeing other human rights, such as health and food. Climate change could intensify water shortage contexts, even affecting children's education access, especially girls⁶⁶.

Although vulnerable populations tend to benefit least from the economic system and are most minor part of the consumer market, they are the most affected by the negative impacts of the climate crisis. Among these populations, young people stand out, as they feel the effects of climate change most severely. According to the study *Unless we act now*⁶⁷, carried out by UNICEF in 2015, more than half a billion children live in extremely high flood zones and almost 160 million live in regions with high or extremely high drought severity zones. These flood and drought areas often are combined with high-poverty areas and low access to essential services such as water and sanitation.

Intergenerational justice is another related concept. It concerns the right to the future of young people, even generations yet to be born, "and we can even speak of a certain political-democratic under-representation of the interests of younger generations in the Contemporary Constitutional State"⁶⁸. This issue is being discussed in the current political context in an emblematic way. In 2021, the German Federal Constitutional Court established landmark issues on climate justice and the right to freedom to be enjoyed in the future in the decision in *Neubauer et al. v. Germany*, as discussed in the second chapter.

Next, the question on how we define injustice or why a particular institution is unjust must be asked. To do this, two values must be used: life and liberty, combined

⁶⁵ UNITED NATIONS (UN). **The Sustainable Development Goals Report 2022**. Available at: <https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf>; Accessed 25 Jul 2022.

⁶⁶ United Nations Children's Fund (UNICEF). **The Climate Crisis is a Child Rights Crisis**: Introducing the Children's Climate Risk Index. New York: United Nations Children's Fund (UNICEF), 2021.

⁶⁷ UNICEF. **"Unless we act now: the impact of climate change on children"**. 2015. Available at: https://www.unicef.org/publications/index_86337.html; Accessed 22 Jun 2021.

⁶⁸ Translated by the author from: SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago (null). **Curso de direito ambiental**. 3. Rio de Janeiro: Forense, 2022. 1 recurso online.

with the conditional value of equality⁶⁹. On the other hand, Rawls describes injustice as "simply inequalities that are not to the benefit of all"⁷⁰. Injustice, therefore, is not only configured in inequality or the value given to equality since the concept of equality covers several nuances that there is no intention to discuss now.

Macintyre⁷¹ claims that two individuals can have different views of justice, and "(...) in certain types of economic situation, their disagreement need not manifest itself in the form of political conflict". Even if the political positions of these people are similar, it is possible that they may disagree on some economic issues, especially when they are required to make sacrifices. Obviously, particular issues influence individuals' position in certain situations, which is understandable to some degree. However, to define what is just and what is unjust, it is essential to go beyond private conceptions.

When Rawls defends the concept of justice by equity, he uses the equal exercise of freedoms as one of the basic principles. For Amartya Sen⁷², capability theory is based on the understanding that the critical question is "equality of what?", rather than whether we need equality at all, in any given space. The point is that establishing a single standard of equality could lead to exclusion and therefore injustice. Inequalities would be tolerable as long as they didn't harm a particular group or individual. As far as possible, inequalities should benefit all.

The idea of a balanced environment illustrates this point: not everyone will experience the same living conditions or have access to the same resources. Yet, within their individuality, environmental degradation in any location will prevent individuals from having access to living conditions. Or at least life as it used to be in the natural conditions of that environment. Social inequalities created by the unequal distribution of climate risks result in benefits for a few people while many others suffer from their

⁶⁹ HELLER, Agnes; FEHÉR, Ferenc. **A condição política pós-moderna**. Tradução de Marcos Santarrita. 2. Ed., Rio de Janeiro: Civilização Brasileira, 2002. p. 122.

⁷⁰ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 54.

⁷¹ Translates by the author from: MACINTYRE, Alasdair. **Depois da Virtude**. Tradução de Jussara Simões. Bauru: EDUSC, 2001. p. 411.

⁷² SEN, Amartya. **A ideia de justiça**. Tradução de Denise Bottmann e Ricardo Mendes. São Paulo: Companhia das Letras, 2011. p. 328-329.

threats.

Inequalities cannot cause environmental degradation, nor can they plausibly justify a certain group having fewer rights to a balanced environment than others. Neither can investment in high GHG emitting activities be carried out with the excuse of seeking to achieve levels of "economic development" in more vulnerable locations. The climate issue thus becomes an essential point for discussing Rawls' principles of justice, as follows.

Rawls⁷³ establishes that there would be two principles of justice which, quite probably, would be a point of consensus in the original position. From the very first formulations, worked on throughout Rawls' thought, he argues that: firstly, one must think of a system of basic freedoms that is compatible with a system of similar freedoms for others; and secondly, although he understands the existence of social and economic inequalities, given that their elimination involves other issues than just justice, he states that accessibility and advantages must be available to all, within an acceptable limit.

In an attempt to understand these principles, he arrives at a general conception of justice, where he describes that all social values "are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage"⁷⁴. Within these social values, which are conceptually broad, there is a reflection on how the right to a healthy environment and climate can be a factor for social justice (or injustice).

In relation to the first principle, thinking about theories of equality can be entirely diverse, such as Amartya Sen's⁷⁵ thoughts on equality of freedom, equality of income, in the treatment of rights, etc. He even points out that these concepts can be contrary to each other. However, theories of equality, although very different, broadly seek non-discrimination.

⁷³ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

⁷⁴ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 74

⁷⁵ SEN, Amartya. **A ideia de justiça**. Tradução de Denise Bottmann e Ricardo Mendes. São Paulo: Companhia das Letras, 2011. p. 37.

Similarly, non-discrimination is one of the foundations of climate justice. Taking this into account means more than risk mitigation, or an equal distribution between those who benefit and those who suffer. In fact, an effective concept of climate justice would include the right of access to a healthy environment as inherent to all human beings, present and future generations, as will be discussed below. The research will also address the concept of inequalities in the concept of justice.

Social and economic inequalities and racial discrimination place the heaviest burden of environmental degradation on the least favoured communities. Acseirad⁷⁶ remembers the Summers memorandum, drawn up by Lawrence Summers in 1991, who was then the World Bank's chief economist. In the memo, Summers made the following statement: "(...) between us, shouldn't the World Bank do more to encourage pollution industries to migrate to less developed countries?". The author of the memo, Summers, justified this by saying that poor nations don't have such a great sense of aesthetics, that the poorest don't have the longevity to suffer the impacts of this pollution and that, finally, death in these countries would have a cheap cost. This kind of thinking is precisely the basis for the environmental racism mentioned above. In the current context of the climate emergency, this concept also extends to the impacts of climate change. The global community is witnessing the sinking of island nations, such as the emblematic Tuvalu and Kiribati⁷⁷, and with it the risk that their cultures, customs and identity will disappear. Most of these nations are composed of indigenous peoples⁷⁸.

This case shows how tolerating certain inequalities puts more or less value on people's or groups' lives, depending on their social status or economic position. Or even other factors of belonging to socially vulnerable groups, such as racial ethnicity (whether they are indigenous or black), gender and sexual orientation. In the concept of justice's original position, based on the reflections pointed out so far, there would be a reflection

⁷⁶ ACSEIRALD, Henri. **O que é justiça ambiental**. Rio de Janeiro: Garamond, 2009. p. 7.

⁷⁷ WORLD HEALTH ORGANIZATION (WHO). **Human health and climate change in Pacific Island countries**. 2015. Available at: https://iris.who.int/bitstream/handle/10665/208253/9789290617303_eng.pdf?sequence=1; Accessed 15 Jan 2024.

⁷⁸ UNITED NATIONS (UN). United Nations Permanent Forum on Indigenous Issues: Indigenous Peoples in the Pacific Region. 2008. Available at: https://www.un.org/esa/socdev/unpfii/documents/factsheet_Pacific_FINAL.pdf; Accessed 05 Dec 2023.

on how climate issues influence both the exercise of basic freedoms as well as the amplification or attenuation of inequalities.

To think of unequal forms that will benefit everyone is, first and foremost, to think of maintaining a climate in which everyone can exist. Or at least not extremely unfavorable to the point of blocking the development of the least favored group. Rawls uses the good as rationality, where in an ordered society "(...) conceptions of their good conform to the principles of right publicly recognized and include an appropriate place for the various primary goods"⁷⁹.

The theory of the good would be used to define the least privileged members of a social group. In a situation where circumstances are equal, "(...) they prefer a wider to a narrower liberty and opportunity, and a greater rather than a smaller share of wealth and income"⁸⁰, and these items would constitute a good. They would be preferred and, faced with the veil of ignorance, there would be an implicit rationality in the choice of original position principles⁸¹.

Just as climate risks and threats cannot be restricted to those who caused them, collective actions designed to deliver collective benefits cannot deny their results to those who did not participate in their choices. This is because these results affect public goods. The selfish rational individual could refuse to contribute to the public good, since he would also enjoy it⁸². If they are placed under a veil of ignorance, not knowing whether they will enjoy the risks and threats or the benefits, one can imagine that they would choose the second option.

Sônia Felipe⁸³ suggests that the principles of justice repress forms of social and institutional development that jeopardise "(...) the natural environmental reserves necessary for the maintenance of biological life and threaten the psychological and

⁷⁹ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 347

⁸⁰ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 348.

⁸¹ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

⁸² RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

⁸³ Translated by the author from: FELIPE, Sônia T. Por Uma Questão de Justiça Ambiental: Perspectivas Críticas à Teoria de John Rawls. In: **ethic@**, Florianópolis, v.5, n. 3, p. 5-31, Jul 2006. p. 17.

biological 'primary interests' of present and future generations". The author calls them "natural environmental goods", within Rawls' conception of the existence of primary goods.

Maintaining a balanced climate is a prerogative for Rawls' principles of justice to be met. Just as climate injustice is caused by inequalities, it intensifies them, preventing the exercise of freedoms and rights for those who suffer the greatest share of environmental risks.

Climate change represents a danger that jeopardises human existence in all its complexity. From social, economic, and cultural issues to the very permanence and existence of life in specific places on the planet. States, companies, and civil society actors have been mobilising to raise awareness and find ways to remedy the environmental catastrophe that is on the horizon. However, the goodwill of some actors is not enough to prevent the issue from worsening and to address the impacts that are already occurring. Internationally, one of the efforts is centred on mitigating the causes of the greenhouse effect by setting GHG emission targets, which states must meet.

The GHG emission levels, as well as the reduction targets, are calculated by scientific studies that aim to set "acceptable" standards for environmental degradation. In this context, the symbolic exercise of science is possible if it is allowed to be impregnated by economic interests, changing assumptions about acceptable values and levels in an impartial manner⁸⁴. This is also worth highlighting when analysing climate risk, since the highest rates of GHG emissions result precisely from activities that profit from them.

The business profit mentioned here does not refer to GHG emissions per se, unlike other forms of environmental degradation, such as logging for sale. In climate issues, the risk assumed is only a means, a consequence of business activity since it stems from industrial activities or energy production. Therefore, once its cause has been identified, and this is not the purpose of the activity itself, means must be sought to neutralise or mitigate it. This relationship is discussed in the next topic.

⁸⁴ FERREIRA, Helene Sivini. A dimensão ambiental da teoria da sociedade de risco. In: FERREIRA, Helene Sivini; FREITAS, Cinthia Obladen de Almendra (orgs.). **Direito Socioambiental e Sustentabilidade:** Estados, Sociedades e Meio Ambiente. Curitiba: Letra da Lei, 2016. p. 108-158

1.1. Business activity and its contribution to the causes of climate change: taking climate risk

Risks are, par excellence, assets of rejection. Their non-existence is presupposed, which means that if there is any doubt, one prefer to keep the situation as it is. Consequently, they can be legitimised, since “one neither saw nor wanted their consequences”⁸⁵, and what was not foreseen could not be avoided, which the author describes as the natural destiny of civilisation.

Ferreira⁸⁶ argues that the risk society " begins when risks arising from human actions and decisions break down the foundations of certainty established by industrial society and, as a consequence, undermine its standards of security". A society that is essentially structured around capital becomes unsustainable in many ways, especially when the environmental aspect is focused. The perception of the environment as just a "resource" to be transformed into profit places the exploitation of nature and the extraction of wealth as more important than the maintenance of basic living conditions.

Neither has the existence of a branch of law that focuses on environmental issues proved to be a plausible solution to the issue. Environmental law, as it has been constructed and as it appears in contemporary society, represents the "rationality of organised irresponsibility"⁸⁷. Such normative support operates in a symbolic way, preventing any concrete proposal for environmental protection. It also ends up making the exploitation of the environment effective and viable through instruments that allow it to be degraded under legal rules.

⁸⁵ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 34.

⁸⁶ Translated by the author from: FERREIRA, Helene Sivini. A dimensão ambiental da teoria da sociedade de risco. In: FERREIRA, Helene Sivini; FREITAS, Cinthia Obladen de Almendra (orgs.). **Direito Socioambiental e Sustentabilidade: Estados, Sociedades e Meio Ambiente**. Curitiba: Letra da Lei, 2016. p. 108-158

⁸⁷ Translated by the author from: FERREIRA, Helene Sivini. A dimensão ambiental da teoria da sociedade de risco. In: FERREIRA, Helene Sivini; FREITAS, Cinthia Obladen de Almendra (orgs.). **Direito Socioambiental e Sustentabilidade: Estados, Sociedades e Meio Ambiente**. Curitiba: Letra da Lei, 2016. p. 108-158

In this risk society, climate risks are the most worrying since the consequences of climate degradation and change can be irreversible. Also, as they are trans-boundary, they are not bound by the recognised geographical limits of states. It doesn't matter if a state controls the risks produced within its territory. If a foreign nation doesn't, climate threats put the well-being and ecological balance of all other countries at risk. Even those with which it does not border.

The impacts of environmental exploitation come in many different forms. From water pollution to the devastation of green areas, the accumulation of solid waste, etc. While problems such as pollution and waste accumulation cause immediate and local impacts, which makes it easier to visualise and materialise the issue to be tackled, others, such as climate change or river silting, generate long-term damage, with consequences in places that often don't contribute to their intensification. This study is not intended to focus on analysing the types of environmental risks, since there are many, but only on climate risks and how they influence distribution within the concept of environmental justice.

So, back to the concept of risk distribution. When this distribution capacity is discussed, it must consider that presenting an average calculation can be cynical. Beck⁸⁸ exemplifies this by mentioning that in a situation where "two men have two apples. One eats both. Thus, they have eaten on average one each". In other words, when calculating the average distribution of risks, it is assumed that everyone will suffer the impacts to the same extent, when in reality some may bear a much greater percentage than others. The average calculation can be cynical, as it doesn't present the real data. However, it is also possible that in relation to exposure to toxins and pollutants, the average calculation is not cynical, but real. This requires analysing each case to reach a precise conclusion.

The point now is to reflect that, in an average calculation of the exposure and distribution of climate risks, whether cynical or real, actors who have not contributed, or have hardly enjoyed the benefits of that risk, will also bear the consequences. Usually, economic profits from environmental exploitation are distributed among a few, while its

⁸⁸ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 25.

consequences and damages affect many others. Of course, those who profit from the risks may well suffer from them, but they still have a greater chance of protecting themselves or moving away from that possibility than those who don't benefit at all. In terms of climate issues, studies show that the populations at risk are not located in the countries that historically have emitted the highest levels of GHGs⁸⁹.

There is a certain economic blindness to the risks. The higher the benefits of a chosen activity, the more acceptable the risks are considered to be. Even though the risk taken may have an extreme event, as in the case of the use of nuclear energy and the catastrophic and long-lasting consequences of a possible accident, it is considered to be taken because of the economic benefits. While extreme risks cannot be disregarded or underestimated, their production is misinterpreted, as Beck puts it in terms of "systematically conditioned blindness to risk"⁹⁰.

This blindness is clearly seen in climate risk-taking. Although there have been warnings for decades about climate change risks due to the increase in anthropogenic GHG emissions, little or nothing has actually been done to mitigate the cause of global warming. This issue has particular characteristics that blur the accountability of emitters, who only "contribute" to its causes and spread the consequences globally. In other words, a company that is a major emitter of GHGs cannot be held solely accountable for climate change, while the locality in which it is located may not suffer, or suffer very little, from the impacts. At the same time, its activity can be profitable and promote an increase in quality of life for those who consume it. What is the attraction for this company to commit itself, and jeopardise its profits, to mitigating climate impacts?

When safety studies are carried out, they limit themselves to estimating measurable risks related to probable accidents, but as Beck points out, "no matter how small an accident probability is held, it is too large when one accident means annihilation"⁹¹. Risk is taken on behalf of people and populations who sometimes won't

⁸⁹ THE CARBON MAP. Available at: <https://www.carbonmap.org/#intro>; Accessed 15 Set 2023.

⁹⁰ Beck, Ulrich **Risk Society**: Towards a New Modernity. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 60.

⁹¹ Beck, Ulrich **Risk Society**: Towards a New Modernity. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p.30.

even benefit from the energy produced from fossil fuels, which are high GHG emitters. For example, imagine a remote location where there are no motor vehicles, and which is suffering more and more each year from water shortages caused by a lack of rainfall.

It's worth noting that these studies are generally based on strict scientific rationality. Risks and consequences are assessed in terms of numbers and statistics, without any attempt to identify their impact on society, whether local or global. Beck⁹² suggests that there is a need to go further and base the risk analysis on a social rationality. Both must coexist and be complementary, since "scientific rationality without social rationality remains empty, and social rationality without scientific rationality remains blind".

When Rawls⁹³ sets out some principles for rational choice, he explains that two principles can ensure sound decisions for long-term plans: the effective means and the greater likelihood. The first looks at whether the means chosen can achieve the desired objective, thus choosing the one that is most efficient in its purpose. As for greater likelihood, it is applied when a result has a greater chance of being achieved by one means over another, even if it can be reached by more than one plan.

Consequently, the greater likelihood "supports this preference even in situations when we cannot be sure that the larger aims can be executed, provided that the chances of execution are as great as with the less comprehensive plan"⁹⁴. From a risk-taking perspective, the opposite also applies. And even though risks exist in a world of probabilities - real ones, but still avoidable - choosing a plan to achieve the objectives should include those choices in which these environmental risks are the most unlikely.

Neglecting environmental risk distribution and the transboundary distribution factor has resulted in an unequal impact among populations and communities, which can be scrutinised from the environmental (in)justice perspective. As follows.

⁹² Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p.30.

⁹³ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

⁹⁴ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 363.

Globally operating companies develop as internationally integrated entities, but they are not subject to a single regulator⁹⁵. Although they hold a leading position on the world economic landscape, the lack of a binding instrument that sets standards for their actions regarding human and environmental rights allows these non-state actors to be major human rights offenders, yet they are not punished for it.

Corporate activity has a significant impact on the global economy. According to the non-governmental organisation Global Justice Now, 69 of the world's 100 largest economic entities are companies and only 31 are countries⁹⁶. This fact can be connected to Beck's⁹⁷ analysis on late modernity. The author says that in this context, the production of wealth is combined with the social production of risks, which constitute distributable objects as well as wealth, in such a way that they constitute positions: of threat or of class.

However, it must not be misunderstood: the risk society is not based on classes. Risks are not separated equally, just like the distribution of wealth. Thus, the risk society can be categorised into those who are affected and those who are not yet affected⁹⁸. Neither do they respect borders, so that even companies established in a specific country can contribute to the development of risks that will have consequences elsewhere. Within this context, so-called transnational companies contribute even more to the risk development scenario.

Before anything else, the concept of transnational companies must be grasped. International instruments do not provide a concrete definition, nor is there a clear distinction between transnationals and multinationals. In its Guidelines for Multinational Enterprises, the Organisation for Economic Cooperation and Development (OECD) does not provide a specific definition, but states that the term refers to "companies or other entities established in more than one country and so linked that they may co- ordinate

⁹⁵ RUGGIE, John Gerard. **Apenas negócios**. São Paulo: Planeta sustentável, 2014. p. 13.

⁹⁶ As announced by the NGO on 17 October 2018 on its website, where the data and the research briefing can be found under the headline "69 of the richest 100 entities on the planet are corporations, not governments, figures show". Available at: <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show>; Accessed 20 Feb 2023.

⁹⁷ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992.

⁹⁸ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992.

their operations in various ways ⁹⁹.

Considered to be non-centralised entities, operating globally and present in several states, these actors play an important role in the global context (and structure) ¹⁰⁰. Given that the primary objective of business activity is to make a profit. Risk industries often relocate to countries with cheap labour, with a strong attraction between extreme poverty and extreme risks ¹⁰¹, as can be seen in well-known cases debated in the context of Business and Human Rights, such as the Bophal case in India.

Undoubtedly one of the problems caused by this type of exploitation is the practice of dumping, an economic concept that has social and environmental consequences. According to the definition given by the International Labour Organisation (ILO), it is an imprecise term used when goods are produced using labour analogous to slavery, which lowers the final cost of the product. It also happens when companies take advantage of loosened labour laws or a lack of controls in certain states to benefit from cheaper production than those that comply with decent labour standards ¹⁰².

In environmental terms, dumping has the same ultimate goals: to lower the production cost and maximise the profit. However, it does so by exploiting the environment, which can sometimes be achieved through legislative permissions from countries with inadequate environmental protection standards, or in the absence of effective monitoring and enforcement of these regulations. The two kinds of dumping can sometimes take place at the same time. For this to be possible, the production market must be divisible. This means that the price in the primary market remains high, while in secondary production there is a race to lower production costs, regardless of the

⁹⁹ ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. OECD Publishing, Paris, 2023. p. 12. Available at: <https://doi.org/10.1787/81f92357-en>; Accessed 10 Feb 2024.

¹⁰⁰ OLSEN, Ana Carolina Lopes. PAMPLONA, Danielle Anne. Violações a Direitos Humanos por Empresas Transnacionais na América Latina Perspectivas de Responsabilização. In.: **Direitos Humanos e Democracia**, Editora Unijuí • ISSN 2317-5389 Ano 7, nº 13, Jan/Jun 2019. p. 131.

¹⁰¹ BECK, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992.

¹⁰² ARRIGO, G.; CASALE, G. **Glossary on labour law and industrial relations** (with special reference to the European Union). Geneva, International Labour Office, 2005. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_113920.pdf; Accessed 10 Feb 2023. p. 85-86.

consequences, whether they are social or environmental¹⁰³.

This type of exploitation is not always illegal. As already mentioned, companies often operate within the regulatory limits set by the countries in which they are established. However, these countries may have such a low level of protection that they allow their population and environment to be exploited. Here, it is vital to scrutinise the actions of transnational companies. The quest for profits and ever-increasing productivity can lead companies and countries to the so-called "race to the bottom"¹⁰⁴, where they sacrifice standards for labour health and safety and levels of environmental protection.

Although risk-taking seems promising at first, Beck¹⁰⁵ notes that when it comes to generating wealth, there is a strong tendency towards a boomerang effect. This is when the risks' producers begin to suffer the harmful effects of the risks they have created. As an example, the author says that this happens when "the pesticides return to their highly industrialized homeland in the fruit, cacao beans and tea leaves". In a climate context, this effect can mean that there is no longer a point of return.

In his theory of justice, Rawls sees social justice as the main topic. To do this, he calls for the most critical social institutions to provide for a distribution of rights and duties, establishing a sharing of advantages through social cooperation. He describes these institutions as "political constitution and the principal economic and social arrangements"¹⁰⁶, including the legal protection of certain freedoms. He says that the first principle of justice is equal liberty, which means guaranteeing an equal system of liberties and rights as broadly as possible¹⁰⁷.

Knowing whether a person can produce the objects of their choice is crucial

¹⁰³ TOMAZZETE, Marlon. **O Conceito do Dumping para a Regulamentação Multilateral do Comércio Internacional**. In.: PRISMAS: Dir., Pol.Pub. e Mundial., Brasília, v.4, n, 1, p 194-214, jan/jul. 2007.

¹⁰⁴ INSTITUTE OF HUMAN RIGHTS AND PEACE STUDIES, MAHIDOL UNIVERSITY (IHRP), ARTICLE 30. **Navigating a new era of business and human rights**. 2019.

¹⁰⁵ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 46.

¹⁰⁶ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 6.

¹⁰⁷ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

to the idea of freedom, which he refers to as "effective freedom". The idea of capacity starts from this freedom - and the scope of it can also occur in different ways¹⁰⁸. For example, decisions made by a doctor in the patient's best interests would not, in general, violate the patient's freedom. As in Rawls, the choice must be rational, considering the objective that is being pursued: the construction of a just society.

Any justice that recognises the exercise of individuals' freedom must include their ability to make a choice that covers all the risks inherent in the desired results. It goes beyond the equal exercise of such freedom. And for this to happen, all the people likely to be impacted by these risks must be included, which rarely happens - not to say never.

Beck explains that "As soon as consequences for people are to be drawn from it, however, the underlying thought short-circuits"¹⁰⁹ leading to a deficit in social thinking. At this point, it either covers everyone, or leaves people and their concerns aside, dealing only with the effects and regional distribution of toxic substances. However, this disregards the plurality of interests and the fact that risks do not respect any differences, social groups, or borders.

When he talks about economic blindness to risks¹¹⁰, he reflects that the moment risks turn into market opportunities, the damage to the freedoms of those who suffer from them is eclipsed by the benefits of those who profit from them. Damage, especially environmental damage, is therefore shared and suffered by communities that neither profit from it nor enjoy the benefits of these risks. And it should be mentioned that the damage is not always as immediate and catastrophic as a nuclear accident. Often, these risks are long-lasting, accumulating gradually, barely perceptible in daily life, just like climate change.

Although the risks are known, such as river pollution or the collapse of a dam,

¹⁰⁸ SEN, Amartya. **A ideia de justiça**. Tradução de Denise Bottmann e Ricardo Mendes. São Paulo: Companhia das Letras, 2011.

¹⁰⁹ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 26.

¹¹⁰ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992.

solidarity only emerges around those affected when the danger becomes visible. At that point, advantages and differences dissolve, and civil society starts to organise itself, regardless of disagreements, to fight or find solutions to the threat that has arisen¹¹¹.

Risks are not the only factor shaping contemporary society. One of the main ones is the transformation in the relationship between risk, space, and time. Ferreira¹¹² describes that "(...) modernisation process risks constitute omnipresent and global threats, which are not easily identified in time and space", as an example of cross-border risks that are perpetuated over time.

Such risks, which eventually turn into threats, result in an unequal distribution of both their negative consequences and their benefits. While some people profit and are looking for ways to protect themselves, which is not always possible, others only get the negative impacts. Sometimes, the civil society group that organises to control or combat threats has not even contributed to or benefited from their causes, not even at a minimal level. This unequal distribution can be considered an environmental injustice.

If justice involves the exercise of freedoms and the equal distribution of these, depriving a certain community of maintaining a healthy environment, or imposing on it the threats of risks assumed by third parties, certainly prevents these individuals from being able to enjoy their freedoms. Furthermore, this situation intensifies inequalities and prevents certain groups from accessing minimum goods and rights.

Acseirad¹¹³ believes that risk theory fails to recognise how social agents evoke the notion of risk, or the "accumulation dynamics that subordinate technical choices". The author calls for the need to build environmental justice that also considers social inequalities in exposure to environmental risks. He defends a logical relationship between "the exercise of democracy and society's capacity to defend itself against

¹¹¹ Beck, Ulrich **Risk Society: Towards a New Modernity**. (Theory, Culture & Society Series). SAGE Publications, London, 1992.

¹¹² FERREIRA, Helene Sivini. A dimensão ambiental da teoria da sociedade de risco. In: FERREIRA, Helene Sivini; FREITAS, Cinthia Obladen de Almendra (orgs.). **Direito Socioambiental e Sustentabilidade: Estados, Sociedades e Meio Ambiente**. Curitiba: Letra da Lei, 2016. p. 118.

¹¹³ Translated by the author from: ACSEIRALD, Henri. **O que é justiça ambiental**. Rio de Janeiro: Garamond, 2009. p. 50-51.

environmental injustice". The next topic deals with the concept of climate justice from the perspective of Rawls' theory.

Once the structure of transnational companies' operations is understood, as well as their potential abuses and exploitations, the study can move on to look at how these operations are framed in the theory of the risk society, contributing to, and profiting from it. Transnational companies develop as globally organised entities¹¹⁴, but they are not subject to a general regulator. Thus, their involvement in the discussion on human rights has become essential for the enforcement of the human rights standards established in international documents.

This is limited by the very will of states to act within the limits of their territories, leaving many individuals without alternatives in the absence of state commitment. As Hannah Arendt¹¹⁵ points out, the concept of human rights becomes unviable when there is no state that guarantees its citizens (or nationals) respect for these rights. And this can happen either because of a weak state or due to the state's lack of interest in guaranteeing these rights.

The pandemic¹¹⁶, declared because of the disease caused by the COVID-19 virus, has made it increasingly clear that there is a need to decentralise the responsibility of states, directly involving other players in decision-making and finding global solutions. It also highlights how fragile the concept of borders is when facing certain issues. A parallel can be drawn between the challenges of the pandemic and those caused by climate change.

To discuss the relationship between the effects of climate change and business activity, one of the important and extremely delicate factors to analyse is the existence of a causal link between the production of risks. This link between action and consequences occurs between actual or potential damaging impacts, generating an unlimited connection

¹¹⁴ RUGGIE, John Gerard. **Apenas negócios**. São Paulo: Planeta sustentável, 2014. p. 13.

¹¹⁵ ARENDT, Hannah. **Origens do totalitarismo**. São Paulo: Companhia das Letras, 2012. p. 395-407.

¹¹⁶ The pandemic was declared on 11 March 2020 by WHO Director-General Tedros Adhanom Ghebreyesus at a press conference, which was widely reported in the specialist media. The article "Coronavirus: WHO declares pandemic", published by the BBC on 11 March 2020, shows this. Available at: <https://www.bbc.com/portuguese/geral-51842518>; Accessed 10 Feb 2023.

of relationships and correlations. Thus, the possibility of relating everything to everything is unveiled. However, "even in the incalculable profusion of individual interpretations, individual conditions are again and again related to each other"¹¹⁷.

As for climate change, it is caused by the emission of GHGs, which intensify the greenhouse effect in the atmosphere, resulting in climatic imbalances known as climate change. The criteria used to understand the contribution of companies to this result are the Intergovernmental Panel on Climate Change (IPCC) studies, one of the main sources of information on climate data. The organisation states that companies are the main contributors to carbon dioxide (CO₂) emissions¹¹⁸, among other types of GHG.

This means that business activities contribute to GHG emissions and profit from them, even though this is not their economic purpose. In turn, these gases contribute to intensifying the greenhouse effect, a natural phenomenon of climate equilibrium that is altered by high anthropogenic gas emissions. To neutralise or mitigate this phenomenon, it is necessary for human activities to neutralise or reduce GHG emissions.

Beck¹¹⁹ warns that risks are goods to be avoided, in which they are presumed not to exist and, if there is any doubt, it is preferable to maintain the existing situation. This becomes clear when people use the argument that the greenhouse effect is something natural and would happen anyway, thereby avoiding human responsibility for the emission of anthropogenic gases. In Beck's thinking, the author explains that this argument is based on an idea of the natural destiny of civilisation, in which one could not avoid what one did not foresee or want.

Similarly, setting "admissible" tolerance limits for risk distribution means agreeing to these values, which Beck describes as permanent ration of collective standardized poisoning¹²⁰. The impacts of the risks taken accumulate with other risks,

¹¹⁷ Beck, Ulrich **Risk Society**: Towards a New Modernity. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 31.

¹¹⁸ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2007: Mitigation**. Contribution of Working Group III to the Fourth Assessment. Report of the Intergovernmental Panel on Climate Change, cambridge, nueva York, cambridge university Press, 2007. p. 449.

¹¹⁹ Beck, Ulrich **Risk Society**: Towards a New Modernity. (Theory, Culture & Society Series). SAGE Publications, London, 1992. p. 34.

¹²⁰ Beck, Ulrich **Risk Society**: Towards a New Modernity. (Theory, Culture & Society Series). SAGE

causing effects in the most diverse areas of life in all their complexity. An example of this is the climate change impact on basic rights, such as access to food, water, and even breathable air.

On 12 July 2019, the UN Human Rights Council adopted Resolution 41/21 on Human Rights and Climate Change¹²¹. The resolution highlights that the effects of climate change have a series of direct and indirect consequences, resulting in the warming of the Earth. As a result of this warming, a climate imbalance sets in, altering rainfall flows, ocean acidity, drought, etc. Such environmental changes can jeopardise the enjoyment of human rights, creating new violations and increasing existing ones. Not to mention their impact on non-human beings, who tend to have even less legal and social protection than human beings in poorer areas.

Climate risks are the most worrying in this risk society, as the consequences can be irreversible, or a reversibility factor is not yet known. Also, as they are transboundary, they are not bound by the recognised geographical limits of states. It doesn't matter if a state controls the risks produced within its territory, if a foreign nation doesn't, climate change threatens the well-being and ecological balance of both.

There is an ongoing debate about whether businesses have a responsibility to respect human and environmental rights, given their significant impact on society and the environment. It is clear that businesses contribute to climate change through their activities and are one of the primary sources of greenhouse gas emissions. However, businesses currently have no legal obligation to address this issue.

In international law, much has been discussed about private corporations' actions and their commitment to human and environmental rights. Pamplona and Olsen¹²² claim that "the lack of regulatory centres able to control the profit rationality has led to harmful effects", such as the climate consequences of corporate action based on profit at

Publications, London, 1992.

¹²¹ ORGANIZACIÓN DE LAS NACIONES UNIDAS (ONU) CONSEJO DE DERECHOS HUMANOS. **Resolução n. n. 41/21 de 2019**. Los derechos humanos y el cambio climático. A/HRC/RES/41/21.

¹²² Translated by the author: OLSEN, Ana Carolina Lopes. PAMPLONA, Danielle Anne. Violações a Direitos Humanos por Empresas Transnacionais na América Latina Perspectivas de Responsabilização. In.: **Direitos Humanos e Democracia**, Editora Unijuí • ISSN 2317-5389 Ano 7, nº 13, Jan/Jun 2019. p. 131.

any cost. Although there is no binding instrument, the international community has made several efforts to establish standards for corporate behaviour.

Examples of voluntary actions, also known as soft laws, include the Global Compact in 2000, the OECD Principles on Corporate Governance in 2004 and the Guiding Principles on Business and Human Rights in 2011. However, these documents are often criticised for being voluntary, creating a symbolic commitment on behalf of companies to protect and promote these rights.

Even so, these efforts have had a positive impact on business awareness and action, as well as opening space to develop other initiatives to engage companies in preventing and mitigating the impacts of their business activities. These initiatives will be discussed in the second and third chapters, when national and international regulations will be explored to establish business responsibility and liability for climate damage.

1.2. Climate (in)justice

The concept of climate justice was discussed above, and how Rawls' fundamental principles of justice are intertwined with this theory. Even though it is increasingly difficult to distinguish environmental issues that are not affected by climate change, and even if this distinction is understood, climate impacts can intensify and exacerbate environmental injustices.

While environmental matters are essential for the development of human freedoms, climate injustice is caused by social inequality, in the same way that it increases it. Firstly, when working with the idea of justice as equity, Rawls presents a contractualist theory, although he limits this contract to the choice of principles of justice¹²³.

Using this well-known theory of justice is a way of better grounding a proposed climate justice theory¹²⁴. The moral aspect of using criteria to define what is fair, chosen under the veil of ignorance and therefore theoretically not subordinated to

¹²³ DUTRA, Delamar José Volpato. ROHLING, Marcos. O direito em uma teoria da justiça de Rawls. In: **Dissertatio**, Pelotas: UFPel, ed. n. 34, 2011. p. 67.

¹²⁴ CICHELERO, César Augusto. NODARI, Paulo Cesar. CALGARO, Cleide. Justiça e o direito fundamental ao meio ambiente. In: **Opini3n Jurídica**, 17 (34) • julio-diciembre 2018 • pp. 171-189 • ISSN (en línea): 2248-4078^a. p. 175.

particular situations, would demonstrate the rationality of human choices in their conception of what is fair.

Rawls argues that from the original position, the rational agent would understand the fair distribution of goods in any social order, meaning that all fundamental social goods should be distributed equally unless situations of inequality lead to benefits. Obviously, this situation described by Rawls exists in the world of ideas, since it would be impossible to carry out a practical experiment in which a person could be placed under the veil of ignorance¹²⁵.

In his thoughts, Rawls¹²⁶ explains that the postulate of prioritising the just over the good is a practical response to the fact that, in modern democratic societies, people emblematically have different conceptions of the good. He also believes that nature is not fair or unfair, but that the distribution of resources by human beings can be.

In this sense, for the basic principles of justice to be achieved, it is necessary for the climate to guarantee an existential minimum, a "(...) bundle of fundamental rights and duties that guarantee protection against any and all degrading and inhuman acts"¹²⁷. Understanding human dignity as a principle and the purpose of legal norms¹²⁸, there is a need to pay attention to it when applying and guaranteeing them, so that injustices suffered can be corrected or mitigated.

These basic rights should include protecting and preserving the environment, as its status ultimately influences the exercise of other rights. In Felipe's¹²⁹ words, "(...) Rawls believes that it is necessary to regulate the use of natural resources, as this is the only way to publicly and institutionally control the negative impact of the excessive exploitation or depletion of these resources on health". Thus, the very concept

¹²⁵ MACINTYRE, Alasdair. **Depois da Virtude**. Tradução de Jussara Simões. Bauru: EDUSC, 2001. p. 417.

¹²⁶ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

¹²⁷ Translated by the author from: CICHELEIRO, César Augusto. NODARI, Paulo Cesar. CALGARO, Cleide. Justiça e o direito fundamental ao meio ambiente. In: **Opinião Jurídica**, 17 (34) • julho-diciembre 2018 • pp. 171-189 • ISSN (en línea): 2248-4078^a. p. 178.

¹²⁸ TORRADO, Jesús Lima. **El fundamento de los derechos humanos**. Argumenta – UENP. Jacarezinho. N. 16. P. 223 – 246, 2012. p. 225.

¹²⁹ Translated by the author from: FELIPE, Sônia T. Por Uma Questão de Justiça Ambiental: Perspectivas Críticas à Teoria de John Rawls. In: **ethic@**, Florianópolis, v.5, n. 3, p. 5-31, Jul 2006. p. 20.

of justice would contribute to restraining practices that endanger natural environmental reserves.

The construction of climate justice would involve the fight against "social/economic/ecological exclusion", seeking to ensure that those who are socially excluded have access to true citizenship.¹³⁰ Exclusion may be caused by social injustice and aggravated by the unequal distribution of climate risks.

Rawls emphasises¹³¹ that rights, opportunities, and freedoms, as well as income and wealth, are primary social goods. Social, because they are linked to the basic structure. To establish this list for disadvantaged groups, it is important to understand how the distribution of goods to the most favoured affects the expectations of the least benefited. The fair distribution of goods is tied to the maximisation of well-being, happiness, and utility¹³².

Justice's primary object is the basic structure of society, defining it as "the arrangement of major social institutions into one scheme of cooperation"¹³³. The justice principles are to "govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life"¹³⁴. The idea of justice must, therefore, guide the actions of social institutions. By applying these principles to the basic structure, the author believes achieving a fair social distribution is possible.

Gargarella¹³⁵ remarks that in the final part of his work on the theory of justice, Rawls tries to show his conception "(...) as being stable, in other words, with a conception that is rational, and that citizens will be motivated to defend because it is associated with

¹³⁰ MENDES, Luís Marcelo. TYBUSH, Jerônimo Siqueira. A Justiça Ambiental como Instrumento no Combate a Distribuição Desigual do Risco Ecológico em Sociedades Ditas Periféricas. In: **Rev. de Direito e Sustentabilidade**, e-ISSN: 2525-9687, Maranhão, v. 3, n. 2, p. 71 – 89, Jul/Dez. 2017. p.83.

¹³¹ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999.

¹³² RAMMÊ, Rogério Santos. **Da justiça ambiental aos direitos e deveres ecológicos**: conjecturas políticos-filosóficas para uma nova ordem jurídico-ecológica. Caxias do Sul, RS: EducS, 2012. p. 77.

¹³³ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 47

¹³⁴ RAWLS, John. **A Theory of Justice**. Revised edition. Cambridge: Harvard University Press, 1999. p. 47

¹³⁵ Translated by the author from: GARGARELA, Roberto. **As teorias da justiça depois de Rawls**: um breve manual de filosofia política. Tradução de reis Freire. São Paulo: Martins Fontes, 2008. p. 225

their own conceptions of what is good to achieve". As for such stability, this would occur in the presence of "appropriate motivations to achieve what justice wants". However, "generating its stability does not mean that this conception of justice will be able to hold its peace".

The theory of justice tries to identify the basis for a broad and deep agreement in order to build an ideal of shared justice that actually works. Broad, covering essential principles. Deep, including conceptions of individuals and society¹³⁶. It is not, therefore, a concept limited to dogmas or solid terms. Its stability would lie precisely in its adaptability.

To think that the stability of this theory lies in its capacity to absorb essential principles is to realise that there is still room for progress in discussions about its scope. However, despite the connection between Rawls' theory of justice and the development of climate justice, some criticisms remain and must be considered when critically analysing the concept of climate justice.

Although Rawls thought of a broad theory, with conceptions of essential principles and aiming to include people and societies, to think of any theory of justice based on his ideas is to drink from the fountain of liberalism. This study shows that climate justice is about reducing social inequalities, but that it is still anthropocentric and is designed to maintain the interests and well-being of human beings and not of nature, even though it does pursue the maintenance of a healthy environment.

What has been criticised about this type of interpretation is how to fit climate policies into a neutral liberal state. Even if climate protection is introduced into non-embracing political values, such as life-sustaining capacity and biodiversity, these would still be adjusted to promote our own good and that of future generations. This way, "the criteria of the second principle would be met, while avoiding emphasising the moderate scarcity inherent in the circumstances of justice"¹³⁷. Therefore, there is no conception of

¹³⁶ GARGARELA, Roberto. **As teorias da justiça depois de Rawls**: um breve manual de filosofia política. Tradução de reis Freire. São Paulo: Martins Fontes, 2008. p. 229-230.

¹³⁷ Translated by the author from: VALDIVIELSO, Joaquín. ¿Hay un lugar en Rawls para la cuestión ambiental?. In: *Isegoría* 31:207-220 (2004). p.13-14.

justice possible when the possibility of seeing nature only as a good to be utilitarianly exploited by human beings are limited. And there is certainly no social justice without guaranteeing a safe climate.

Further on in this discussion, Felipe¹³⁸ argues that Rawls' theory, to some extent, fits into a conception of environmental justice, including on climate issues. However, it would be limited if wanted to develop a non-speciesist environmental justice, which would include the moral conception not just of humans and large mammals, but of something beyond our rational needs. The inequalities raised so far would be those between the human species itself, and not between it and other living beings.

From this perspective, Rawls' theory of justice responds to climate issues that affect human beings as holders of freedoms and rights. Within this definition, climate justice would be met even if it caused harm to other species or to the environment in general, as long as it satisfied the primordial needs of human beings and did not cause them direct or indirect harm that would prevent them from developing their freedoms. The methodological choice is due to the subject of the research: corporate accountability for mitigating causes and repairing damages related to climate change. This accountability is determined "to" or "in relation to" another person, so whenever a responsibility is being discussed, the corresponding rights must also be considered¹³⁹. Rights related to human beings. Although not opposed to it, the object of this study is not to recognise other species, or beings of nature, as rights holders.

Nussbaum¹⁴⁰ also pointed out that contractualist theories face three unsolved problems, two of which are related to what is being argued here: nationality and species belonging. The problem with nationality lies in the fact that today's world is increasingly interdependent, which must be considered when addressing questions of justice raised by inequalities between nations. Socio-environmental risks and consequences are

¹³⁸ FELIPE, Sonia T. Rawls' Legacy: a Limited Possibility of a Non-Speciesist Environmental Justice. In: **ethic@**, Florianópolis, v.4, n.1, p. 23-37, Jun 2005. p. 24.

¹³⁹ BRUNNÉE, Jutta. GOLDBERG, Silke. LORD, Richard. RAJAMANI, Lavanya. Overview of legal issues relevant to climate change. In: **Climate change liability**: transnational law and practice / [edited by] Richard Lord ... [et al.]. y Cambridge University Press, New York, 2012.

¹⁴⁰ NUSSBAUM, Martha C. **Fronteiras da Justiça**: Deficiência, nacionalidade, pertencimento à espécie. Tradução de Susana de Castro. São Paulo: Editora WMF Martins Fontes, 2013. p. 23-24.

increasingly transcending internationally recognised borders and becoming global problems.

On the second problem, that of species belonging, Nussbaum¹⁴¹ states that there is "(...) a need to extend our theories of justice outside the human realm", since "our choices affect the lives of non-human species every day and often cause them enormous suffering". Thus, environmental issues can also be seen as essential to preserving the life and well-being of non-human beings.

This perspective will not be further explored, but it is important to mention it to realise how there is still a long way to go in understanding environmental issues and their essentiality in the concept of justice and equality. Although at first this point wasn't even considered directly, today there is much discussion about its importance in guaranteeing the well-being of human beings, and perhaps future conceptions of justice will start to consider issues beyond human existence.

Even though it may be criticised, the discussion around climate justice that puts the survival of human peoples and communities first has generated results. Increasingly, theoretical developments are pointing towards an integration of environmental preservation in the most diverse academic areas, which also tends to have an impact on the practical application of some theories. An example of this is what is currently happening in Amsterdam.

In April 2020, the Dutch city announced that it would adopt the economic model developed by Kate Raworth¹⁴², the so-called "Donut Economy"¹⁴³, which presents itself as an alternative to growth at any cost. The British economist claims in her work that the traditional economy is not working, identifying seven crucial aspects that demonstrate how it has led us down the wrong path. In response, she proposes an

¹⁴¹ Translated by the author from: NUSSBAUM, Martha C. **Fronteiras da Justiça**: Deficiência, nacionalidade, pertencimento à espécie. Tradução de Susana de Castro. São Paulo: Editora WMF Martins Fontes, 2013. p. 24.

¹⁴² RAWORTH, Kate. **Economía rosquilla**: 7 maneras de pensar la economía del siglo XXI. Traducción de Francisco Ramos. Buenos Aires: Grupo Planeta; Ediciones Paidós, 2018.

¹⁴³ The project can be consulted on the economist's website "KATE RAWORTH - Exploring doughnut economics". Available at <<https://www.kateraworth.com/2020/04/08/amsterdam-city-doughnut/>>; Accessed 08 Dec 2023.

economic model that would, in her words, be well suited to the 21st century.

In line with the discussion above, the sixth point identified by the author should be highlighted. Here, the author states that for a long time it was thought that a clean environment was a luxury item, which reinforced environmental exploitation under the argument that "long-term growth will clean everything up". A clearly fallacious idea. She argues that the ideal would be to create a circular economy¹⁴⁴, restoring humans as full participants in the Earth's cyclical processes¹⁴⁵.

Using Rawls' perspective as a starting point for climate justice focusing on social justice in scenarios of unequal distribution of environmental risks can be considered anthropocentric¹⁴⁶. It must then be questioned the possibilities of broadening this discussion beyond the perspective of human dignity and existence.

The intense environmental degradation and concerns about the future of this planet have raised new questions, and with them new paradigms that need to be discussed and rethought. Since the 1960s, environmental issues have been linked to social inequalities, culminating in the movement for environmental justice from the 1980s onwards, as explained above. But what would constitute this theory of climate justice?

Understanding the concept of climate justice first requires us to revisit existing theories of justice, looking at how the issue can be proposed within these conceptions. This study will work the concept based on the postulates of John Rawls, in his theory of justice as equity.

Rawls defines fundamental premises and principles that must be observed to achieve a conception of justice that takes social justice into consideration. To do so, he describes a scenario in which the individual would be under a veil of ignorance when choosing these premises and principles, hoping that, by not knowing what position or benefits they would have, they would end up making rational choices, moving closer to

¹⁴⁴ That's why it was named Donuts, an US doughnut-shaped sweet.

¹⁴⁵ RAWORTH, Kate. **Economía rosquilla**: 7 maneras de pensar la economía del siglo XXI. Traducción de Francisco Ramos. Buenos Aires: Grupo Planeta; Ediciones Paidós, 2018.

¹⁴⁶ RAMMÊ, Rogério Santos. **Da justiça ambiental aos direitos e deveres ecológicos**: conjecturas políticos-filosóficas para uma nova ordem jurídico-ecológica. Caxias do Sul, RS: EducS, 2012. p. 97.

a conception of equitable justice.

Although the principle of justice is to tolerate inequalities only when they are beneficial to the less fortunate, the author does not expressly consider environmental issues. However, realising that social inequalities motivate environmental discrimination, and that the latter tends to aggravate the former, one could bring up the importance of the concept of climate justice being considered by social institutions guided by the theory of justice.

Climate justice would be covered by Rawls' theory of justice on two main points. Firstly, as the environment is essential for the existence of living conditions, it would constitute a necessary good for the fulfilment of freedoms and rights. The second and most important point is that climate injustice consists of the unequal distribution of climate risks and threats, which is influenced by social inequalities and at the same time exacerbates them.

Despite the fact that climate risks are not necessarily distributed by class, some of them end up hitting the less privileged the hardest. Meanwhile, environmental degradation and the dumping of rubbish and toxic products are often socially and economically motivated, leaving the poorest to live in a degraded environment.

Rawls states that inequality can only be tolerated when it is beneficial to the least fortunate. Following his thinking, to fulfil his concept of justice, environmental justice must first be achieved. Thus, as it is essential for the exercise of rights and freedoms, as well as a point of intensification or alleviation of inequalities, the preservation of the environment and the promotion of environmental justice is consistent with justice as equity.

However, this thinking is also criticised. The main points of criticism are that this type of climate justice is anthropocentric and that, despite recognising the importance of environmental issues, they are only being addressed in the interests of human beings. There is also discussion about the inclusion of non-human species and the consideration of the environment as an ecosystem. At this point, the existence of nature should be considered beyond human needs.

In reality, there is still a lot to discuss in order to arrive at a concept of environmental climate justice that fulfils the demands of the issue, especially the climate emergency. However, analysing the points at which existing theories of justice meet and diverge is essential for understanding how and where progress should be made in the theoretical construction of this concept. With this theory as a basis for building climate justice, and understanding its practical limitations, the second and third chapters are dedicated to a legal analysis of how climate impacts can be interpreted in order to configure the responsibility, or liability, of companies that assume climate risk within this context.

CHAPTER 2: CORPORATE CLIMATE RESPONSIBILITY

“The responsibility to respect human rights requires that business enterprises: (...) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;”

(Guiding Principle n. 13, UNGP)

Civil liability in the Brazilian Civil Code is defined as the obligation to repair damage caused by an unlawful act (articles 186 and 187)¹⁴⁷. This definition is generally associated with the idea of repairing damage or holding the perpetrator of the damage liable. However, the concept of legal liability can be understood from two perspectives: preventative and reparative. This chapter focuses on the first. Bonna explains that this aspect applies when the “need to comply with obligations previously established in legal transactions, rules or principles”¹⁴⁸ acts before the breach of legal duty.

These legal duties are not always clearly described in a legal instrument, and their concept may result from the norm's interpretation. The author explains that based on the horizontal effectiveness of fundamental rights, the legal responsibility described in the Civil Code materialises these constitutionally established rights¹⁴⁹. Within this context, understanding the legal duties related to climate measures requires an interpretation of this legal responsibility based on solid instruments.

In 2011, based on the final report presented by Special Representative John Ruggie, the UNGPs were adopted by the UN Human Rights Council by Resolution 17/4 on 16 June 2011¹⁵⁰. The document established 31 principles, organised into three pillars: the State's duty to protect human rights; the companies' responsibility to respect human rights, and the access to remedy mechanisms¹⁵¹.

¹⁴⁷ BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm; Accessed 10 Jan 2024.

¹⁴⁸ BONNA, Alexandre Pereira. **Punitive damages (Indenização Punitiva) e os danos em massa**. Rio de Janeiro: Lumen Juris, 2015, p. 22

¹⁴⁹ BONNA, Alexandre Pereira. **Punitive damages (Indenização Punitiva) e os danos em massa**. Rio de Janeiro: Lumen Juris, 2015, p. 23

¹⁵⁰ UNITED NATIONS (UN) HUMAN RIGHTS COUNCIL. **A/HRC/17/L.17/Rev.1**: Human rights and transnational corporations and other business enterprises. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G11/141/87/PDF/G1114187.pdf?OpenElement>; Accessed 10 Jan 2024.

¹⁵¹ RUGGIE, John Gerard. **Apenas negócios**. São Paulo: Planeta sustentável, 2014.

The UNGPs' Pillar II is structured in two parts: from Principle 11 to Principle 15, they set out the fundamental principles, defining the responsibility of companies to respect human rights. The fundamental principles address how and when human rights should be respected in business activities. The second part of this pillar, from Principle 16 to 24, covers the operational principles, which deal with companies' political commitments and monitoring methods¹⁵².

It must be clear that the term "corporate responsibility" to respect human rights does not refer to a legal responsibility. This "responsibility to respect" refers to a taxonomy and a responsibility for companies to "adopt appropriate measures"¹⁵³ in relation to activities that may cause (or cause) negative impacts on human rights. As will be discussed in this chapter, although the term does not refer to a legal obligation, this commitment, albeit voluntary, to respect human rights can (and should) be considered as an element in shaping other companies' legal obligations in their actions.

The rights that are covered by this responsibility to respect are defined in principle 12. The principle refers to internationally recognized human rights, setting the UN Charter of Human Rights¹⁵⁴ and the ILO Declaration as minimum standards. A balanced climate is essential for these rights to be enjoyed, as well as the fact that climate change can lead to or even increase human rights violations. The UN has already internationally recognized this view, and the Brazilian Supreme Court has recognized it at national level. Thus, the perception of climate risks is closely related to the promotion and enjoyment of minimum rights.

The second chapter of this study seeks to explore the existence of corporate climate responsibility, analysing its applicability based on principles and norms of environmental law, such as precaution and prevention, and civil law, such as good faith

¹⁵² UNITED NATIONS (UN). **Guiding Principles on Business and Human Rights**: Implementing the United Nations "Protect, Respect and Remedy" Framework. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 Jan 2024.

¹⁵³ BIRD, Robert C., Ed.; CAHOY, Daniel R., Ed.; PRENKERT, Jamie Darin. **Law, business and human rights**: bridging the gap. Edward Elgar Publishing. Ed. 2014

¹⁵⁴ The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

and the duty of care. Companies' voluntary and public commitments to respect human rights and climate issues must be considered. Here, the structure of paradigm cases brought against companies in other countries will be reviewed, according to the methodology outlined in the first chapter.

First of all, the chapter will address the regulatory landscape in which the debate on the protection of human rights and climate takes place, such as the legal and principle-based issues that emerge as part of the climate debate. The second topic explores the concept of climate responsibility, applying Environmental and Civil Law concepts to climate protection logic. Finally, in a review of this construction on international scene, the arguments and decisions in climate litigation cases which seek to put this new perspective into practice will be explored.

2.1. The climate regulatory landscape

The first step in understanding the concept of corporate climate responsibility is to analyse the normative and legal elements of this new paradigm. Beyond the already consolidated legal concepts, the topic explores the terms under construction and the debates that are emerging in the light of the climate emergency.

First briefly it must be understood the discussions that have already taken place between international actors. The United Nations' first significant meeting to deal with the environment was the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden. Also known as the Stockholm Conference, it established the definitive entry of the environmental issue into the multilateral agenda and created the United Nations Environment Program (UNEP). During the conference, one of the main points under discussion was the different concerns and interests between the so-called "developing" countries and those with the highest levels of industrialization¹⁵⁵.

The Stockholm Declaration was adopted at the Conference¹⁵⁶, and its

¹⁵⁵ LAGO, André Aranha Corrêa do. **Estocolmo, Rio, Joanesburgo: O Brasil e as Três Conferências Ambientais das Nações Unidas**. Brasília: Fundação Alexandre de Gusmão (Funag), 2006.

¹⁵⁶ UNITED NATIONS ENVIRONMENT PROGRAM (UNEP). **Stockholm Declaration**: Declaration on the Human Environment. (Adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972; see U.N. General Assembly Resolutions 2994/XXVII, 2995/UVII and

Preamble (item 7) already stated that in order to achieve the environmental objectives sought, it would be necessary to accept "(...) responsibility on the part of citizens and communities, as well as companies and institutions at all levels, all sharing equally in the common efforts". The principle of responsibility towards present and future generations presents this need to impose responsibility (duties and obligations) in the legal field, in addition to moral responsibility. Although it is a general legal principle, this study adds aspects of environmental law, with the main application of the climate focus and urgency in the analysis of this principle.

In 1992, Rio de Janeiro hosted discussions at the United Nations Conference on Environment and Development (UNCED), also known as the Rio Conference or Rio 92, which was considered a success, even though many people thought that few effective solutions had been proposed. The meeting addressed the relationship between globalization and environmental concerns, arguing that the two are not incompatible. As a result of this Conference, Agenda 21 was created, including recommendations for States to implement.¹⁵⁷

The 1992 document¹⁵⁸ had already stated in its Principle 3 that "the right to development must be exercised in such a way as to respond equitably to the development and environmental needs of present and future generations". This statement can be related to the principle of environmental solidarity, linking it to the idea of a human shared heritage and the common nature of environmental goods. Due to this common nature, it must be extended beyond State borders¹⁵⁹. Although the document does not expressly mention the extent of this responsibility regarding companies, the definition of this projection beyond State action needs to include other actors.

The topic drew more and more attention until an international treaty called

2996/XXII of 15 December 1972). Available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf>; Accessed 20 Jan 2024.

¹⁵⁷ LAGO, André Aranha Corrêa do. **Estocolmo, Rio, Joanesburgo: O Brasil e as Três Conferências Ambientais das Nações Unidas**. Brasília: Fundação Alexandre de Gusmão (Funag), 2006.

¹⁵⁸ UNITED NATIONS (UN). **Rio Declaration**: United Nations Conference on Environment and Development. Rio de Janeiro. Brasil, 3-14 de junho de 1992.

¹⁵⁹ SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago (null). **Curso de direito ambiental**. 3. Rio de Janeiro: Forense, 2022. 1 recurso online.

the Kyoto Protocol was established in 1995¹⁶⁰, binding States to specific GHG emission reduction targets. This document is a complementary treaty to the United Nations Framework Convention on Climate Change, designed at the Rio Convention in 1992.

Before establishing concrete actions to be taken, the Kyoto Protocol goes through an important discussion on technical concepts needed to understand the cause and effect of climate change. It explains the gases that cause the greenhouse effect, what the greenhouse effect is, how they cause climate change, the activities that emit them, the quantities, and bases for calculating the impact of emissions, etc¹⁶¹. As outlined in the introduction, this study does not aim to re-discuss these points, based on the idea that these terms and concepts are already widely discussed and defined in the international scientific community.

In 2002, the World Summit on Sustainable Development was held in Johannesburg, South Africa. The Conference was preceded by a certain lack of interest on the part of the international community and society in general, as many governments at the time showed no interest in the issue. On the other hand, the 2002 agenda is a critical point in terms of discussing corporate involvement and promoting good environmental practices. The fact that large companies are involved in adopting, individually or collectively, social, and environmental responsibility standards, as well as the commitment to sustainable development by transnational companies, were celebrated topics in the Conference's balance sheet.¹⁶²

Finally, in 2012, the United Nations Conference on Sustainable Development was once again held in Rio de Janeiro. Affectionately nicknamed Rio+20, it commemorated the 20th anniversary of the first Conference in the city. The companies' environmental responsibility took centre stage on the agenda, and it was reinforced that

¹⁶⁰ **KYOTO PROTOCOL.** Berlin, 1995. Available at: http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/Protocolo_Quito.pdf. Accessed 10 Jun 2023.

¹⁶¹ **KYOTO PROTOCOL.** Berlin, 1995. Available at: http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/Protocolo_Quito.pdf. Accessed 10 Jun 2023.

¹⁶² LAGO, André Aranha Corrêa do. **Estocolmo, Rio, Joanesburgo: O Brasil e as Três Conferências Ambientais das Nações Unidas.** Brasília: Fundação Alexandre de Gusmão (Funag), 2006.

all actors must engage in promoting sustainable development.¹⁶³

These events were aimed at tackling environmental issues in general, discussing a wide range of issues relating to human needs, the economy, development, and the environment. The issues ranged from water resources, solid waste, sustainable purchasing, construction, and tourism to climate change caused by global warming, the subject of this research. Specific meetings on climate change have placed the role of States at the centre of the debate. However, the relationship between companies or other private organisations and climate issues is not widely discussed.

Concerns about the effects of climate change are not new. As can be seen from the timeline above, the issue began to be discussed within the framework of UNEP and the World Meteorological Organisation (WMO) between 1988 and 1990. The Intergovernmental Panel on Climate Change (IPCC), which was set up in 1988 and is the main forum for evaluating scientific knowledge on climate change, played a major role in these conclusions¹⁶⁴. However, even after several meetings, in 2024 there is still no real action by States and companies to effectively address the emergency of this issue.

While problems such as pollution and the waste accumulation cause an immediate and local impact, which makes it easier to visualise and materialise the issue to be tackled, climate change causes long-term damage, resulting in consequences in places that often don't contribute to its intensification. Thus, combating this problem becomes a complex issue, since it requires special attention from actors who, in addition to profiting from this exploitation, are relatively protected from its consequences.

In 2015, the city of Paris hosted COP-21, when the so-called Paris Agreement was signed¹⁶⁵. The agreement established that the signatory countries should work towards limiting the temperature increase to 1.5°C above pre-industrial levels. To achieve

¹⁶³ **CONFERÊNCIA DAS NAÇÕES UNIDAS SOBRE DESENVOLVIMENTO SUSTENTÁVEL.** Rio de Janeiro, 13-22 de junho de 2012. Available at: <http://www.rio20.gov.br/sitemap.html>; Accessed 10 Jun 2023.

¹⁶⁴ LAGO, André Aranha Corrêa do. **Estocolmo, Rio, Joanesburgo: O Brasil e as Três Conferências Ambientais das Nações Unidas.** Brasília: Fundação Alexandre de Gusmão (Funag), 2006.

¹⁶⁵ UNITED NATIONS (UN). Paris Agreement. 2015. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; Accessed 23 Jan 2024.

this goal, the signatory countries must engage in actions to reduce GHG emissions. The document addresses the importance of increasing the participation of the public and private sectors in implementing actions to prevent and mitigate the causes of climate change. In 2023, Brazil's Interministerial Committee on Climate Change (CIM, in Portuguese) decided on the 4th update of the Nationally Determined Contribution (NDC)¹⁶⁶. The country's current target is to reduce greenhouse gas emissions by 37 per cent below 2005 levels by 2025 and by 50 per cent below 2005 levels by 2030. In the document, Brazil recognises the importance and climate impact of sectors such as agribusiness and energy.

Until then, all the international events focussed on the State's role, mainly addressing its obligations and its part in the climate commitment. Although they called for business involvement in these areas, eventually resulting in voluntary recommendations by these actors to promote sustainable development, there was not, and still is not, a binding commitment for companies. This is not only true in the environmental field, but also in the protection of human rights in general.

As mentioned, the UNGPs were adopted in 2011. The UNGPs are based on three pillars: States must protect human rights against human rights violations caused by third parties; businesses have a responsibility to respect human rights; and victims of violations must have easy access to remedies.¹⁶⁷ Although it is a soft law legal document, UNGPs cannot be ignored, as they correspond to a "normative reference for the production of other legal norms or a parameter for the adoption of conduct, being recognised as a legitimate reference by their recipients"¹⁶⁸. As an example, one can cite the creation of a working group at the Human Rights Council to draw up an international

¹⁶⁶ MINISTÉRIO DO MEIO AMBIENTE E MUDANÇA DO CLIMA. GOVERNO FEDERAL DO BRASIL. Acordo de Paris - Contribuição Nacionalmente Determinada (NDC) do Brasil. Available at: <https://www.gov.br/mma/pt-br/composicao/smc/dcol/cim/arquivos-cimv-anteriores-a-2023/item-de-pauta-3-paris-agreement-brazil-ndc-final-1.pdf/view>; Accessed 23 Feb 2024.

¹⁶⁷ PAMPLONA, Danielle Anne. SILVA, Ana Rachel Freitas da. Os princípios orientadores das nações unidas sobre empresas e direitos humanos: houve avanço?. In: BENACCHIO, Marcelo (coordenador), VAILATTI, Diogo Basílio. DOMINQUINI, Eliete Doretto (organizadores). **A sustentabilidade da relação entre empresas transnacionais e Direitos Humanos**. Curitiba: CRV, 2016.

¹⁶⁸ Translated by the author from: OLSEN, Ana Carolina. PAMPLONA, Danielle Anne. Violações a Direitos Humanos por Empresas Transnacionais na América Latina: Perspectivas de Responsabilização. In: **Revista Direitos Humanos E Democracia**, 2019, 7(13), 129–151. <https://doi.org/10.21527/2317-5389.2019.13.129-151>

treaty capable of binding states and companies to human rights (Resolution A/HRC/26/L.22/Rev.1), and the proposals and adoptions of national mandatory due diligence standards¹⁶⁹. Furthermore, the states that voluntarily adhered to the UNGPs assumed the duty to establish Action Plans or internal protection mechanisms in accordance with these principles¹⁷⁰.

Since their adoption, the UNGPs have influenced several documents as well as commercial and financial indicators. The OECD Guidelines, updated in 2023¹⁷¹ and which have been reflecting the guidelines adopted in the UNGPs since 2011¹⁷², stand out as an example. In 2023, the UN Working Group in charge of negotiating a treaty on Business and Human Rights published a note on human rights and climate change¹⁷³. The briefing note explains that the responsibility of companies to respect human rights, as established in the UNGPs, includes a responsibility to act on actual and potential impacts related to climate change.

This kind of commitment does not create legal obligations. However, they are important for establishing mandatory criteria for companies to access markets or

¹⁶⁹ UNITED NATIONS (UN) HUMAN RIGHTS COUNCIL. Resolução A/HRC/26/L.22/Rev.1: Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Available at: <https://documents.un.org/doc/undoc/ltd/g14/064/48/pdf/g1406448.pdf?token=PrS3IOwc5x7cayUs7r&fe=true>; Accessed 23 Jan 2024.

¹⁷⁰ CARDIA, Ana Cláudia Ruy. GIANNATTASIO, Arthur Roberto Capella. O Estado de Direito Internacional na Condição Pós-Moderna: a força normativa dos princípios de Ruggie sob a perspectiva de uma Radicalização Institucional. In: BENACCHI, M. (coord.); VAILATTI, D. B.; DOMINQUINI, E. D. (org.). **A sustentabilidade da relação entre empresas transnacionais e Direitos Humanos**. Curitiba: CRV, 2016. p. 127-146.

¹⁷¹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). **OECD Guidelines for Multinational Enterprises on Responsible Business Conduct**. 2023. Available at: <https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1707340163&id=id&accname=guest&checksum=9DAD5E71C4548B2E59D4DE66A044C89A>; Accessed 23 Jan 2024.

¹⁷² ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). **OECD Guidelines for Multinational Enterprises**. 2011. Available at: <https://www.oecd-ilibrary.org/docserver/39ad30a0-pt.pdf?expires=1706810181&id=id&accname=guest&checksum=310B06CE93A5CD4DF30B3BEE963864DF>; Accessed 23 Jan 2024.

¹⁷³ UNITED NATIONS (UN). Working Group on the issue of human rights and transnational corporations and other business enterprises. **Information Note on Climate Change and the Guiding Principles on Business and Human Rights**. Junho de 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>; Accessed 15 Jan 2024.

financing and investment lines. As will be discussed in the next section, although voluntary commitments are not legally binding, they can be used to shape and complement legal obligations.

Two resolutions stand out in terms of recognising climate issues as human rights issues: Resolution 41/21¹⁷⁴ of the UN Human Rights Council on 12 July 2019 on Human Rights and Climate Change, and Resolution A/76/L¹⁷⁵ of the UN General Assembly on 26 July 2022, declaring the human right to a clean, healthy, and sustainable environment. This second resolution also stated that climate change poses serious threats to the ability of present and future generations to effectively enjoy all human rights.

Despite its importance to expressly recognise these concepts within the UN General Assembly and Human Rights Council, it should be clear that resolutions are formal expressions of the opinion or will of a UN body¹⁷⁶. They are not, therefore, treaties or commitments made in multilateral negotiations, but are considered recommendations for State-members.

Moving on to a national overview, the Brazilian legal system sets out principles, objectives, guidelines, and instruments for managing climate issues in Law No. 1,287 of 2009, which establishes the National Policy on Climate Change (PNMS)¹⁷⁷. The law, however, does not set targets or sanctions. It can be interpreted more like a charter of good intentions, defining guidelines for the Brazilian State's actions. The policy also does not address businesses' role in climate commitment. In other words, it is insufficient for implementing effective actions to tackle the causes and consequences of climate change.

This law does, however, set out some key concepts on the climate issue,

¹⁷⁴ ORGANIZACIÓN DE LAS NACIONES UNIDAS (ONU) CONSEJO DE DERECHOS HUMANOS. **Resolução n. n. 41/21 de 2019**. Los derechos humanos y el cambio climático. A/HRC/RES/41/21.

¹⁷⁵ UNITED NATIONS (UN). **Resolution A/76/L.75 26/07/2022**. The human right to a clean, healthy and sustainable environment.

¹⁷⁶ UNITES NATIONS (UN). **Guidelines for United Nations Resolutions**. 2020. Disponível: https://unitar.org/sites/default/files/media/publication/doc/UN%20Resolution%20Guidelines_Handbook_English-7x10-Unitar_1.pdf; Accessed 15 Jan 2024.

¹⁷⁷ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

which can be used to understand companies' climate responsibility and liability. According to Article 2 of the National Policy on Climate Change, impact is defined as "the effects of climate change on human and natural systems"¹⁷⁸. As mitigation, it is understood:

"(...) technological changes and substitutions that can reduce the use of resources and emissions per unit of production, as well as the implementation of measures that reduce greenhouse gas emissions and increase greenhouse gas sinks".¹⁷⁹

In terms of duties and obligations, Article 3 of the National Climate Policy states that "everyone has the duty to act, for the benefit of present and future generations, to reduce the impacts of anthropogenic interference on the climate system"¹⁸⁰. Along these lines, the 1988 Brazilian Federal Constitution devotes Chapter VI to the environment, addressing rights and duties related to its protection. According to the Constitution's article 225, since the ecologically balanced environment is a right of all and essential for a healthy quality of life, "(...) the public authorities and the community have a duty to defend and preserve it for present and future generations"¹⁸¹.

The Brazilian Constitution already established the environment as a fundamental right for all citizens, long before it was recognised as a human right. Furthermore, recent decisions by the Federal Supreme Court (STF) have reinforced Brazil's constitutional commitment to safeguarding this right. The landmark decision in the case ADPF number 708, handed down in 2022, is worth highlighting. The case was about the government's management of the National Climate Change Fund (*Fundo Clima*) and the contingency of resources earmarked for the prevention and mitigation of climate change. As well as ordering the federal government to adopt the necessary

¹⁷⁸ Translated by the author from: BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

¹⁷⁹ Translated by the author from: BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

¹⁸⁰ Translated by the author from: BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

¹⁸¹ Translated by the author from: BRASIL. Constituição da República Federativa do Brasil de 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; Accessed 10 Jan 2024.

measures for the Climate Fund to function, the decision is a landmark one, since the rapporteur of the case, Minister Luís Roberto Barroso, recognised in his decision that "treaties on environmental law are a species of the genre of human rights treaties"¹⁸².

Under Article 5, Paragraph 3, in Brazil, international treaties and conventions on human rights are equivalent to constitutional amendments¹⁸³. Thus, by stating that treaties on environmental law are a species of the genus human rights treaties, the STF recognises that the Paris Agreement, ratified by Brazil in 2016 and enacted into law in 2017¹⁸⁴, now has supra legal status¹⁸⁵. This constitutional status in the legal system is a significant milestone. It can also mean an argumentative strength in climate litigation cases in Brazil.

In order to create a national framework law on Human Rights and Business and establish guidelines for promoting public policies on the subject, Brazil is currently working on Bill 572, proposed in 2022. Although it does not yet have a specific Action Plan or regulations on companies and human rights, Brazil adopted UNGPs through Decree 9.751 in 2018. This established the National Guidelines on Business and Human Rights and was revoked in 2023 by Decree 11.772, setting up the Interministerial Working Group to draw up a proposal for the National Policy on Human Rights and Business. Having adhered to the UNGPs, the country has a duty to implement mechanisms to protect these principles.

Even though the state has not yet implemented effective measures to protect human rights, according to the UNGPs, companies cannot fail to fulfil their responsibility

¹⁸² Translated by the author from: SUPREMO TRIBUNAL FEDERAL (STF). Acórdão da Arguição de Descumprimento de Preceito Fundamental (ADPF) n. 708. <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15353796271&ext=.pdf>; Accessed 10 Jan 2024.

¹⁸³ As long as they are approved in each house of Congress, over two rounds, by three-fifths of the votes of the respective members. Source: BRASIL. Constituição da República Federativa do Brasil de 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; Accessed 10 Jan 2024.

¹⁸⁴ BRASIL. Decreto n. 9.073, de 5 de junho de 2017. Promulga o Acordo de Paris sob a Convenção-Quadro das Nações Unidas sobre Mudança do Clima, celebrado em Paris, em 12 de dezembro de 2015, e firmado em Nova Iorque, em 22 de abril de 2016. Available at: https://www.planalto.gov.br/ccivil_03/ato2015-2018/2017/decreto/d9073.htm; Accessed 10 Jan 2024.

¹⁸⁵ The 'supra legal' status (hierarchically between the law and the constitution) would be granted to human rights treaties that have not gone through the approval process defined in §3 of Article 5, based on the theory of the 'triple hierarchy of international treaties', according to the STF's jurisprudence defined in RE 466.343, in 2008. Available at: <https://www.stf.jus.br/imprensa/pdf/re466343.pdf>; Accessed on 10 August 2024.

to respect human rights, including when these impacts are related to climate issues. Therefore, even if the Brazilian State has not effectively implemented human rights and climate protection standards, companies must fulfil the responsibility set out in the UNGPs. Using concepts already established in environmental and civil law, aspects of this responsibility will be discussed.

2.2. The concept of corporate climate responsibility: premises and interpretations

When talking about the legal system of human rights, the approach is usually centred on the state¹⁸⁶. However, it is not only state entities that cause impacts on human rights. Although states have a duty to protect human rights, companies and private organisations have a responsibility to respect them. This responsibility persists even if the state fails to fulfil its duty to protect. According to the UNGPs, the responsibility of companies to respect human rights should be interpreted differently from the companies' legal accountability¹⁸⁷. This legal accountability would be defined in internal regulatory systems and would be enforceable in the competent jurisdictions. This distinction is the first point that must be made clear.

It will not attempt to explore the enforcement of the "business responsibility to respect human rights" set out in the UNGPs, or how the company should implement this responsibility. Nor will the concept of mandatory due diligence established in specific legislation be the subject of analysis. This study believes that studying this applicability would be more appropriate when approaching mandatory due diligence regulations, based on the UNGPs' guidelines - which is not the subject of this work. Instead, it will use the responsibility described in the UNGPs as part of the construction of normative concepts already defined by law.

Based on the research object, it will explore the existing concept of

¹⁸⁶ TÜRKELLI, Gamze Erdem. KRAJEWSKI, Markus. VANDENHOLE, Wouter. Beyond 'Global Good Samaritans': Transnational Human Rights Obligations. In: **Journal of Human Rights Practice**, Volume 15, Issue 3, November 2023, Pages 794–804, <https://doi.org/10.1093/jhuman/huad027>.

¹⁸⁷ UNITED NATIONS (UN). **Guiding Principles on Business and Human Rights**: Implementing the United Nations "Protect, Respect and Remedy" Framework. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 Jan 2024.

responsibility and how responsibility for impacts on human rights related to climate change can be configured based on these concepts. To do so, the terms, commitments and definitions outlined in national and international documents and regulations will be used, as explained in the previous topic. There are some gaps in the idea of responsibility in relation to human rights. Regarding the scope of this responsibility in relation to business activities, the lack of recognition of how responsibility should be attributed and distributed for different human rights obligations¹⁸⁸ can be highlighted.

In Portuguese, there is no grammatical difference between "responsibility" and "liability". In Brazilian civil legislation, the use of the term is linked to the concept of "civil liability", established in article 927 of the Brazilian Civil Code. This is defined as the obligation to provide reparation for damages caused by an unlawful act (articles 186 and 187)¹⁸⁹. As defined in the introduction to this study, the concept of "liability" will be addressed in the third chapter. This topic therefore deals with the construction of the concept of "responsibility" from the human rights and climate perspective proposed above. This responsibility is also used in the climate context as "the duty to mitigate the causes of climate change"¹⁹⁰, as will be explained below.

The legal difference between responsibility and liability is not widely explored in Brazilian legal literature. Particularly when it comes to the responsibility of non-state actors, such as companies and individuals. Brazilian legislation focuses on identifying the author of the immediate damage and has yet to regulate the identification of future environmental damage¹⁹¹. The lack of any specific provision makes it difficult to recognise this duty to mitigate regarding climate responsibility. However, the existence

¹⁸⁸ TÜRKELLI, Gamze Erdem. GIBNEY, Mark. VANDENHOLE, Wouter. KRAJEWSKI, Markus. Conclusions: The future of extraterritorial human rights obligations. p. 463. In: TÜRKELLI, Gamze Erdem. GIBNEY, Mark. VANDENHOLE, Wouter. KRAJEWSKI, Markus. **The Routledge Handbook on Extraterritorial Human Rights Obligations**. Abingdon, Oxon ; New York, NY : Routledge, 2022.

¹⁸⁹ BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm; Accessed: 10 Jan 2024.

¹⁹⁰ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP). **Global Climate Litigation Report: 2023 Status Review**. 2023. Nairobi. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3; Accessed 05 Jan 2024.

¹⁹¹ DE ALENCAR XAVIER, Yanko Marcius. DE MOURA SOARES, Pedro Lucas. Brazil. In: BRUNNEE, Jutta; GOLDBERG, Silke; LORD, Richard; RAJAMANI, Lavanya (Editors). **Climate Change Liability: Transnational law and practice**. Cambridge University Press, 2011.

of general clauses in Brazilian civil law, coupled with an interpretation that reflects the set of rules, could provide solutions for applying this climate institute.

Under Environmental Law, certain precepts make it easier to distinguish between prior responsibility and post-damage liability. However, the study cannot overlook the open concepts brought in by civil law, which allow us to attribute responsibility to companies' actions even before the damage materialises. In other words, the requirement to act responsibly, the existence of obligations and duties that require business activities to observe the potential impacts of their actions. And based on this, implement measures to mitigate or prevent these impacts from materialising.

Conceptually, there is a distinction between civil and environmental law, but the precepts and principles established are within the same legal universe. This connects with the systemic aspect for interpretation, which recognises the innate connection in which all the institutions and legal rules are united in a grand unity¹⁹². The standards, concepts, and interpretations from different branches of law must be applied in harmony. Therefore, both branches of law must be interpreted together in order to protect the ultimate legal good: human rights. This study specifically looks at the risks related to climate change.

First of all, concrete legal protection is analysed. As discussed in the previous section, Brazil's 1988 Federal Constitution imposes "(...) on the public authorities and the community" the duty to defend and preserve the environment for present and future generations. According to the law, the general principles of economic activity in Brazil include the social function of property and the defence of the environment. It also provides that products and services and their production and supply processes may be treated differently according to their environmental impact (article 170, III and VI)¹⁹³. This article also contains the principle of reducing social and regional inequalities, which can be directly affected and increased by climate impacts. This means that when a

¹⁹² SAVIGNY, Friedrich Karl. **System of the Modern Roman Law**, Volume 1 Making of modern law: Foreign, comparative and international law, 1600-1926 System of the Modern Roman Law. Traduzido por William Holloway. Editora J. Higginbotham, 1867

¹⁹³ BRASIL. Constituição da República Federativa do Brasil de 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; Accessed 05 Jan 2024.

company contributes to climate change, it breaches this constitutional principle, as it affects the vulnerability and inequalities of regions and social groups. The Constitutional text should guide the interpretation and application of infra-constitutional rules. Furthermore, the normative force of the principles is well recognised¹⁹⁴. Constitutional principles represent the essence of the values enshrined in the Constitution, which gives unity and harmony to the normative system¹⁹⁵. Thus, these principles established in the Constitution must be observed when understanding the existence of corporate climate responsibility.

Business activity in Brazil is ruled by the Civil Code¹⁹⁶. Article 421 of the Civil Code extends the social function to contracts, with the aim of "serving social interests, restraining the will of the contracting parties, in order to protect them within the community"¹⁹⁷. Article 422 also establishes that contractual relations must be based on probity and good faith. Maria Helena Diniz adds that "according to the theory of the social function of the company, the entrepreneur and the company should have the power and duty, in carrying out their activity, to act in the interests of the community"¹⁹⁸. This principle emphasises the "respect for loyalty"¹⁹⁹, and establishes a due diligence in the conduct of business, which should "be the model of social conduct in search of an economy geared towards general well-being and the improvement of business activity to achieve an excellent standard of efficiency"²⁰⁰.

The interpretation of civil law does not address this due diligence based on the UNGPs' guidelines as a standard. However, there are cases in which these guidelines

¹⁹⁴ ALVES, Vinícius Silva. A força normativa dos princípios e sua importância para a releitura do direito civil brasileiro: reflexões a partir dos princípios da dignidade humana e igualdade. In: **Direito, Estado e Sociedade** n. 55 p. 342 a 364 jul/dez 2019.

¹⁹⁵ BARROSO, Luís Roberto. **A nova interpretação constitucional: ponderação, direitos fundamentais e relações privadas** / Luís Roberto Barroso (organizador) – 3ª ed. Revista – Rio de Janeiro: Renovar, 2008.

¹⁹⁶ BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm; Accessed 05 Jan 2024.

¹⁹⁷ DINIZ, Maria Helena. Importância da Função Social da Empresa. In: **Revista Jurídica**, vol. 02, n°. 51, Curitiba, 2018. pp. 387-412. p. 394

¹⁹⁸ DINIZ, Maria Helena. Importância da Função Social da Empresa. **Revista Jurídica**, vol. 02, n°. 51, Curitiba, 2018. pp. 387-412.

¹⁹⁹ DINIZ, Maria Helena. Importância da Função Social da Empresa. **Revista Jurídica**, vol. 02, n°. 51, Curitiba, 2018. pp. 387-412.

²⁰⁰ DINIZ, Maria Helena. Importância da Função Social da Empresa. **Revista Jurídica**, vol. 02, n°. 51, Curitiba, 2018. pp. 387-412.

can be incorporated into the interpretation of probity and good faith applied to business relations. This happens when companies publicly commit to the responsibility of respecting human rights, based on the UNGPs, establishing that they understand their role and that they will implement measures to deal with any impacts they are or may cause. Or when they commit to climate targets and establish that they will act on the basis of the Paris Agreement. Although voluntary, these commitments cannot be a mere empty declaration. As part of the context of climate responsibility and human rights, there is no escaping that good faith in relations with business partners, customers and society must also include the posture assumed by the company from these commitments. This approach will be explored in the fourth chapter.

Another aspect of Brazilian civil law can also be addressed in the conception of this climate liability: the existence of a duty of care based on the civil liability defined in articles 186 and 187 of the Civil Code²⁰¹. The enforcement of civil liability occurs when an unlawful act caused by a voluntary action or omission, negligence, or recklessness, violates a right and causes damage to others, as will be explored in the third chapter. An unlawful act is constituted by anyone who "by voluntary action or omission, negligence or recklessness, violates a right and causes harm to others"²⁰², or, even if they are a right holder, when exercising it, "manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good customs"²⁰³. This topic begins by discussing the existence of a responsibility of action (or non-omission), more specifically a duty of care, to prevent or mitigate the perpetration of an act that could have a negative impact on human rights. In other words, there are two aspects to civil liability: preventive, a responsibility to avoid the action (or omission) that causes the damage, and reparatory, a liability for the damage caused. This second aspect will be analysed in the third chapter. In this study, these aspects are related to preventing or mitigating corporate contributions to the causes of climate change.

²⁰¹ BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm; Accessed 05 Jan 2024.

²⁰² BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm; Accessed 05 Jan 2024.

²⁰³ BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm; Accessed 05 Jan 2024.

The duty of care is an institute recognised in Common Law, defined as an action that should have been taken in order to avoid causing injury to a specific right²⁰⁴. The applicability of this concept in relation to the duty to mitigate the causes of climate change has also been widely debated. However, this preventive aspect of legal liability under Brazilian civil law is not widely explored in this context. When talking about civil liability, it is often looked at the liability side, after the damage has been caused. Here the study seeks to understand the aspect of preventive action, mitigating the causes of climate change. This would be applied in the following context: companies know that their actions, omissions, negligence or recklessness in investing in and expanding activities that cause high levels of GHG emissions are contributing to the worsening of climate change; this is impacting human rights and increasing social inequalities; so, as part of the preventive aspect of this responsibility, businesses must act with a duty of care in order to avoid or minimise the causes of this damage. The existence of a duty of care is not something new in Brazilian civil law and is already recognised and widely applied in Consumer Law²⁰⁵.

The climate issue must also consider the provisions of environmental law. Environmental protection law has the principle of prevention as one of its oldest and most characteristic principles²⁰⁶. The Inter-American Court of Human Rights has already stated that this principle is considered part of customary international law²⁰⁷. Prevention implies the obligation to take the necessary measures before environmental damage occurs, recognising that, due to its particularities, it would be impossible to restore the status quo ante once the damage has occurred²⁰⁸. It differs, however, from precautionary principle,

²⁰⁴ HUNTER, David. SALZMAN, James. Negligence in the Air: The Duty of Care in Climate Change Litigation. *University of Pennsylvania Law Review*, vol. 155, no. 6, 2007, pp. 1741–94. JSTOR, <http://www.jstor.org/stable/40041378>; Accessed 03 March 2024.

²⁰⁵ SOARES, Flaviana Rampazzo. O dever de cuidado e a responsabilidade por defeitos. In: *Revista de Direito Civil Contemporâneo*. vol. 13. ano 4. p. 139-170. São Paulo: Ed. RT, out.-dez. 2017

²⁰⁶ SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago (null). **Curso de direito ambiental**. 3. Rio de Janeiro: Forense, 2022. 1 recurso online.

²⁰⁷ CORTE INTERAMERICANA DE DIREITOS HUMANOS. Caso Comunidades Indígenas Miembros De La Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina. 2020. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_esp.pdf; Accessed 05 Jan 2024.

²⁰⁸ CORTE INTERAMERICANA DE DIREITOS HUMANOS. Caso Comunidades Indígenas Miembros De La Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina. 2020. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_esp.pdf; Accessed 05 Jan 2024.

which is also widely recognised in environmental law.

While prevention refers to cases in which there is knowledge and certainty of environmental damage, precaution refers to uncertain damage. This refers to the existence of doubts or uncertainties about the severity and extent of these environmental impacts²⁰⁹.

Principle 15 of the Declaration adopted at Rio 92 sets out the precautionary principle:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.²¹⁰

In Brazilian law, the principle was already widely accepted by the doctrine and practitioners of environmental law, mainly based on the application of constitutional precepts. However, it is understood that it was in Law 11.105 of 2005 (the Biosafety Law) that the precautionary principle was expressly recognised in Brazil²¹¹. In addition, national legislation requires an analysis of the magnitude and importance of the potential impacts caused by business activities. This obligation is laid down in the Environmental Impact Study (EIA), and the Environmental Impact Report (RIMA), required by Federal Law No. 6.938 of 1981, which defines the National Environmental Policy (PNMA), and regulated by Resolution No. 001 of 23/01/1986 of the National Environmental Council (CONAMA)²¹². Thus, before setting up a business, the company must be aware the risks of future damage (certain and uncertain).

Regarding the climate approach in Brazil, Law 12.187 of 2009 establishes the PNMC²¹³. As mentioned, the law is interpreted as a letter of good intentions and does not provide a concrete basis for effective action by the Brazilian State to address climate

²⁰⁹ SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago (null). **Curso de direito ambiental**. 3. Rio de Janeiro: Forense, 2022. 1 recurso online.

²¹⁰ UNITED NATIONS (UN). **Rio Declaration**: United Nations Conference on Environment and Development. Rio de Janeiro. Brasil, 3-14 de junho de 1992.

²¹¹ SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago (null). **Curso de direito ambiental**. 3. Rio de Janeiro: Forense, 2022. 1 recurso online.

²¹² CONSELHO NACIONAL DO MEIO AMBIENTE (CONAMA). Resolução nº 001 de 23/01/1986. Available at: <https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-230186.PDF>; Accessed 13 Feb 2024.

²¹³ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

change. However, at this point, it should be highlighted the concepts set out in the law. The PNMC defines climate "impact" as "the effects of climate change on human and natural systems", which can mean negative impacts on human rights related to climate change. Other conceptual delimitations such as "emissions"²¹⁴ and "source"²¹⁵ must also be included in order to define corporate climate responsibility, as will be applied in the fourth chapter. Finally, it recognises the aspects of intergenerational justice and responsibilities beyond state action. The norm states that, in terms of the measures to be adopted when implementing climate policy, it will be considered that "everyone has a duty to act, for the benefit of present and future generations, to reduce the impacts of anthropogenic interference on the climate system".

This shows the existence of legal norms that foresee the need for preventive action, i.e. a responsibility (duty/obligation) to act in order to prevent climate impacts. However, this responsibility is generally linked to State action, requiring the Government to implement measures to ensure that this duty of protection is effective. Although the failure of the Brazilian State to act can be discussed, this is not the focus of this study. Based on the UNGPs' guidelines, it should be remembered that companies must fulfil their responsibility to respect human rights even when the state fails to fulfil its obligations to guarantee them. Using legal hermeneutics, the application of the analysed prerogatives as a corporate climate responsibility should be explored.

Depending on the type of activity, branch, and sector in which the company operates, the contribution to GHG emissions can be more intense, and the measures to be taken must be more concrete and more transparent. In certain branches and sectors, some companies may not be able to take effective measures in their direct activity, but they can guarantee, by tracking their supply chain, that the industrial processes involved in producing their final product have the lowest possible impact.

²¹⁴ Defined as: "the release of greenhouse gases or their precursors into the atmosphere in a specific area and over a given period". Translated by the author from: BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

²¹⁵ Definido como: "processo ou atividade que libere na atmosfera gás de efeito estufa, aerossol ou precursor de gás de efeito estufa". Fonte: BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

The study argues that Brazilian legislation already has a framework for recognising this duty to mitigate. Other countries have already been exploring the application of constitutional, civil, and environmental law prerogatives to establish this climate responsibility. The next topic will analyse emblematic cases in the international context. The purpose of this analysis is to find, within the international experience, elements to set the framework for establishing this corporate climate responsibility in Chapter Four.

2.3. Building climate responsibility on an international landscape: case analyses

The need to establish corporate climate responsibility for its impact on human rights must be better explored²¹⁶. That means judicially recognising the role of companies in combating and adapting to climate change, since they must deal with the climate risks they assume when engaging in economic activities. Corporate climate responsibility can also be translated as the corporate duty to mitigate GHG emissions. While in Brazil this climate responsibility is still under construction, on the international stage climate litigation cases are already debating businesses' role as the main contributors to the causes of climate change.

Before going on to discuss the main cases in the debate and establishment of this concept, the table below gives a summarised overview of these cases. A theoretical cut is made to understand the construction of climate responsibility, or the duty to mitigate GHG emissions, based on the proposition of new paradigms in understanding already established norms²¹⁷. The study aims to analyse the legal construction used to create new paradigms in civil law to meet the demands of the climate emergency.

The cases summarised in Table 1 will be further discussed below, extracting emblematic elements from the pleading, defence and ruling (if any). The goal is to

²¹⁶ PIRES, Julia Stefanello; PAMPLONA, Danielle Anne. Perspectivas da litigância climática em face de empresas: o caso Milieudefensie et al. vs. Royal Dutch Shell. **Revista de Direito Internacional**, Brasília, v. 19, n. 1, p. 145-163, 2022.

²¹⁷ Therefore, cases based on specific regulations on mandatory due diligence that are already in force, such as Notre Affaire à Tous and Others v. Total (2021) and Envol Vert et al. v. Casino (2021) based on the French Duty of Vigilance Act (LOI n° 2017-399 du 27 mars 2017), will not be analysed. This delimitation was necessary because this type of law establishes a specific legal responsibility for companies in relation to human rights and environmental issues. The approach sought in this research is to explore how it can be typified by the civil and environmental parameters already established in domestic legislation.

understand the construction of corporate climate responsibility across the international landscape, and use the lessons learnt to propose a framework for a new paradigm based on the norms of Brazilian civil law, to be carried out in Chapter 4 of this study.

Table 1 – Leading cases on corporate climate responsibility

Case	Location	Status	Reasons	Court decision
<i>Milieudefensie et al. v. Royal Dutch Shell</i> (2019)	The Hague District Court (Rechtbank Den Haag), Netherlands	Decided at first instance. An appeal has been lodged.	Book 6, Section 162 of the Dutch Civil Code, on the duty of care, configured using the Kelderluik criteria.	Royal Dutch Shell (holding company) must reduce its Scope 1, 2 and 3 emissions across its entire energy portfolio by 45 per cent by 2030, compared to 2019 emission levels.
<i>Deutsche Umwelthilfe v. Bayerische Motoren Werke AG (BMW)</i> (2021)	Munich Regional Court (Landgericht München), Germany Case dismissed at first and second instance.	The plaintiffs have announced that they will appeal to the Constitutional Court.	Art. 20a of the German Basic Law and the recognition of the fundamental right to climate protection in the case of Neubauer, et al. v. Germany (2020) The case was admitted but dismissed.	The Court held that for the obligation to be recognised, it is not necessary for the damage to have occurred; it is sufficient for it to be imminent. However, this was not yet the case.
<i>Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG</i> (2021)	Stuttgart Regional Court (Landgericht Stuttgart), Germany Case dismissed at first and second instance.	The plaintiffs have announced that they will appeal to the Constitutional Court.	Art. 20a of the German Basic Law and the recognition of the fundamental right to climate protection in the case of Neubauer, et al. v. Germany (2020)	The Stuttgart Regional Court dismissed the case on the grounds that it is up to the legislator to decide on appropriate measures to protect the climate.
<i>Kaiser, et al. v. Volkswagen AG</i> (2021)	Braunschweig Regional Court (Landgericht Braunschweig), Germany Case dismissed at first instance.	The plaintiffs have announced that they will appeal at second instance. Violation of the fundamental right to climate protection and infringing on the rights and freedoms of future generations. The claim is based on the Paris Agreement and the German Civil Liability Act.	The plaintiffs rely on the decision in the case of Neubauer, et al. v. Germany (2020).	The court dismissed the case, ruling that with the introduction of the Federal Climate Protection Act (KSG), the legislator had fulfilled its duty to protect citizens arising from fundamental rights. The company's private sector duties do not go beyond the protection duties that the state derives directly from its fundamental rights.

				The court of appeal has not yet ruled.
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Source: PIREs, Julia Stefanello.

The cases will be examined under the following comparative points: (i) who the plaintiffs and defendants are; (ii) where the litigation was filed; (iii) the competence of the court in which it was filed; (iv) the international norms used in the lawsuits; (v) the concepts and structures used to shape the idea of climate responsibility and/or liability; (vi) the human rights implied; (vii) the theories of justice presented and, in cases where the courts have spoken, (viii) the position of the court within the criteria listed above.

a) Milieudefensie et al.v. Royal Dutch Shell case (2019)

The first case worth highlighting is the emblematic Royal Dutch Shell judgement in the Netherlands in 2022. The lawsuit was brought by the Dutch NGO Milieudefensie, with approximately 17,000 citizens and other non-governmental organisations (NGOs) (ActionAid NL, Both ENDS, Fossielvrij NL, Greenpeace NL, Young Friends of the Earth NL, Waddenvereniging). The defendant is Royal Dutch Shell, the holding company of the global Shell group, an Anglo-Dutch oil multinational, which at the time had its headquarters in the Netherlands²¹⁸. The Hague District Court (Rechtbank Den Haag) was chosen as the competent court to hear the case precisely because of Royal Dutch Shell's tax domicile when the lawsuit was filed.²¹⁹

In 2018, based on the Dutch regulatory system's prerogatives, the NGO Milieudefensie sent a notification²²⁰ to Royal Dutch Shell, demanding that the company take responsibility for maintaining an inadequate climate policy. The next month, the

²¹⁸ In 2021, a few months after the conviction, Royal Dutch Shell changed its name to Shell plc. and moved its headquarters to the UK. The company announced that the decision was motivated by tax issues. Although climate activists have highlighted the influence of the conviction in changing the company's headquarters, this paper does not intend to examine this decision in depth. Source: <https://www.shell.com/media/news-and-media-releases/2022/royal-dutch-shell-plc-changes-its-name-to-shell-plc.html>; Accessed : 23 jul. 2023.

²¹⁹ TRIBUNAL DE HAIA. Milieudefensie et al. Verweerder: Royal Dutch Shell. Proces: C/09/571932/HA ZA 19-379. "4.3.5". 26 maio 2021. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jul 2021.

²²⁰ MILIEUDEFENSIE. Noticeletter Shell. Liability for inadequate climate policy. Available at: <https://en.milieudefensie.nl/news/noticeletter-shell.pdf>; Accessed 23 Jan 2023.

company announced that it would not respond to the demand, as it considered it unjustifiable²²¹. Over the course of a year, thousands of people joined the lawsuit, and in April 2019 Royal Dutch Shell was served at its headquarters in The Hague, the Netherlands, on behalf of 17,379 plaintiffs and seven organisations, including Milieudefensie²²².

Oral hearings were held in December 2020 and closing arguments in February 2021. The case was heard on 26 May 2021. Although the decision is based on the Dutch legal system, it is clear from reading the documents the influence and impact of international commitments made by Royal Dutch Shell and the Dutch state.

The case was built around Book 6, Section 162 of the Dutch Civil Code²²³, from which, according to the court decision²²⁴, a duty of care could be established to ensure the prevention of global warming. At first, a commitment was sought from the company, based on the assumption of its responsibility to adapt its business policies and strategies in line with the climate objectives set out in the Paris Agreement²²⁵.

Two points stand out in the debate on the Milieudefensie et al. v. Royal Dutch Shell case: the use of civil, rather than administrative, environmental standards to establish the defendants' climate liability, and the use of the Dutch Supreme Court precedent known as the Kelderluik criteria²²⁶, which allows the court to use additional criteria to assess whether the duty of care has been respected.

With regard to the first point, the main point of the case is a wrongful act

²²¹ MILIEUDEFENSIE. Reaction Shell. Milieudefensie zet klimaatzaak tegen Shell door. Available at: <https://milieudefensie.nl/actueel/milieudefensie-start-definitief-klimaatzaak-tegen-shell>; Accessed 23 Jan 2023.

²²² MILIEUDEFENSIE. Timeline climate case Shell. 2018. Available at: <https://en.milieudefensie.nl/climate-case-shell/timeline>; Accessed 23 Jan 2023.

²²³ DUTCH CIVIL CODE. Book 6 The law of obligations. Available at: <http://www.dutchcivillaw.com/civilcodebook066.htm>; Accessed 23 Jan 2021.

²²⁴ TRIBUNAL DE HAIA. Milieudefensie et al. Verweerder: Royal Dutch Shell. Proces: C/09/571932/HA ZA 19-379. “4.3.5”. 26 maio 2021. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jan 2021..

²²⁵ UNITED NATIONS (UN). **Paris Agreement**. 2015. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; Accessed 23 Jan 2023.

²²⁶ VÉASE Kelderluik-arrest. Hoge Raad. NJ 1966, 136. ECLI:NL:HR:1965: AB7079. Datum uitspraak: 5 nov. 1965. Datum publicatie: 24 set. 2019. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1965:AB7079>; Accessed 23 Jan 2023.

committed by the defendants, who would be violating their duty of care by not engaging in effective actions that are in line with the voluntary international commitments made. In 2016, Roger Cox, a lawyer who acted on behalf of Milieudefensie, spoke about the correct decision in *Urgenda Foundation v. State of the Netherlands*²²⁷ to bring a case based on civil law, given that one of the main problems with climate issues is precisely the inadequate protection of environmental laws, which fail to meet the needs demanded by the issue²²⁸. There is a clear influence on the construction of the case brought against Royal Dutch Shell.

This is also a delicate issue in Brazilian legislation, which does not have a code unifying environmental provisions. That makes it difficult to define the State's, companies', and social actors' responsibilities in climate action. As will be discussed below, the use of civil concepts and norms is valuable, especially in relation to how an unlawful act is defined in the event of non-compliance with an obligation related to climate commitments.

Finally, in relation to the use of the Kelderluik criteria²²⁹, mentioned above, this topic is closely related to the Dutch legal context, since it is a precedent of the Hague Court. These criteria made it possible to construct the arguments used by the Urgenda Foundation and Milieudefensie in their respective cases to establish the duty of care based on international norms and commitments.

The plaintiffs argued for the use of the Kelderluik criteria²³⁰, using human rights, specifically the right to life and the right to respect for private and family life. They also used voluntary international documents that have been taken on as public

²²⁷ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform: Urgenda Foundation v. State of the Netherlands. Duty of care under Articles 2 and 8 ECHR. Reduction greenhouse gas emissions.** Available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf; Accessed 10 May 2023.

²²⁸ COX, Roger. A climate change litigation precedent: *Urgenda Foundation v The State of the Netherlands*. **Journal of Energy & Natural Resources Law**, v. 34, n. 2, p. 143-163, 2016

²²⁹ VÉASE Kelderluik-arrest. Hoge Raad. NJ 1966, 136. ECLI:NL:HR:1965: AB7079. Datum uitspraak: 5 nov. 1965. Datum publicatie: 24 set. 2019. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1965:AB7079>; Accessed 23 Jan 2023.

²³⁰ VÉASE Kelderluik-arrest. Hoge Raad. NJ 1966, 136. ECLI:NL:HR:1965: AB7079. Datum uitspraak: 5 nov. 1965. Datum publicatie: 24 set. 2019. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1965:AB7079>; Accessed 23 Jan 2023.

commitments by Royal Dutch Shell, such as the Guiding Principles on Business and Human Rights²³¹, the UN Global Compact²³² and the OECD Guidelines for Multinational Enterprises²³³.

The Court included a total of fourteen points in its interpretation of the duty of care, which were taken into account when analysing the case: (i) the political position of Royal Dutch Shell in the Shell group; (ii) the CO2 emissions of the Shell group; (iii) the consequences of CO2 emissions for the Netherlands and the Wadden region (where the trial took place); (iv) the right to life and the right to respect for the private and family life of Dutch residents and the inhabitants of the Wadden region; (v) the UN Guiding Principles on Business and Human Rights; (vi) the verification and influence of Royal Dutch Shell on the Shell group's CO2 emissions and its business relations; (vii) what is needed to avoid dangerous climate change; (viii) possible abatement pathways; (ix) the dual challenge of halting dangerous climate change and meeting the growing global energy demand of the population; (x) the ETS system and other cap and trade emissions systems that apply in other parts of the world, permits and current obligations of the Shell group; (xi) the effectiveness of the abatement obligation; (xii) the responsibility of states and society; (xiii) the onerousness of Royal Dutch Shell and the Shell group to fulfil the abatement obligation, and (xiv) the proportionality of Royal Dutch Shell's abatement obligation.²³⁴

The main question mark over Royal Dutch Shell's responsibility is how the company would have an influence or control over scope 3 CO2 emissions, that is, indirect

²³¹ UNITED NATIONS (UN). **Guiding principles on business and human rights**: implementing the United Nations “protect, respect and remedy” framework. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 23 Jan 2023.

²³² UNITED NATIONS. **Global compact**. Available at: <https://www.unglobalcompact.org/>; Accessed 23 Jan 2023.

²³³ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). **OECD Guidelines for Multinational Enterprises on Responsible Business Conduct**. 2023. Available at: <https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1707340163&id=id&accname=guest&checksum=9DAD5E71C4548B2E59D4DE66A044C89A>; Accessed 23 Jan 2023.

²³⁴ TRIBUNAL DE HAIA. Milieudefensie et al. v. Royal Dutch Shell, 26-05-2021, (C/09/571932 / HA ZA 19-379). “4.4.1”. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jan 2023.

emissions arising from the organisation's activities but owned or controlled by third parties (such as consumers). Here, the decision recognises that the level of responsibility is related to the extent to which companies have control and influence over GHG emissions²³⁵, as well as the fact that Royal Dutch Shell is incontrovertibly aware of the quantity of its emissions, and the consequences and risks of its activities, as is made clear in the following excerpt:

It knows that the exploration, production, refinery, marketing, and the purchase and sale of oil and gas by the Shell group as well as the use of products of the Shell group generates significant CO2 emissions worldwide, which undoubtedly contributes to climate change in the Netherlands and the Wadden region (see 4.4 (2.)). RDS has for a long time known of the dangerous consequences of CO2 emissions and the risks of climate change to Dutch residents and the inhabitants of the Wadden region. RDS also knows the amount of CO2 emissions of the Shell group; it has reported on the volume of CO2 emissions (see 2.5.3)²³⁶.

The decision clearly states that the social and environmental benefits of combating climate change must come before companies' economic and commercial interests²³⁷. Given the evolution of human rights, and the involvement of corporations in not violating and promoting these rights, it is interesting to see how the Hague District Court confronts these generally conflicting issues. The court summarises that the purpose of corporate action should not just bring in profits for itself, but also focus on the society that surrounds it, as can be read in the decision.

The reduction obligation requires a change of policy, which will require an adjustment of the Shell group's energy package (see legal ground 4.4.25). This could curb the potential growth of the Shell group. However, the interest served with the reduction obligation outweighs the Shell group's commercial interests, which for their part are served with an uncurtailed preservation or even growth of these activities. Due to the serious threats and risks to the human rights of Dutch residents and the inhabitants of the Wadden region, private companies such as RDS may also be required to take drastic measures

²³⁵ TRIBUNAL DE HAIA. Milieudéfensie et al. v. Royal Dutch Shell, 26-05-2021, (C/09/571932 / HA ZA 19-379). "4.4.18". Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jan 2023.

²³⁶ TRIBUNAL DE HAIA. Milieudéfensie et al. v. Royal Dutch Shell, 26-05-2021, (C/09/571932 / HA ZA 19-379). "4.4.20". Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jan 2023.

²³⁷ TRIBUNAL DE HAIA. Milieudéfensie et al. v. Royal Dutch Shell, 26-05-2021, (C/09/571932 / HA ZA 19-379). "4.4.53". Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true> ; Accessed 23 Jan 2023.

and make financial sacrifices to limit CO2 emissions to prevent dangerous climate change.

An important element is Royal Dutch Shell's public approach to its commitments. The Paris Agreement²³⁸ is used to address what should be done by the company. Although the treaty is not binding on its signing parties and does not tie Royal Dutch Shell to the fulfilment of its objectives, the document states that mitigating the causes of climate change will not be achieved solely through the actions of states and must involve the commitment of other actors to reduce emissions. Therefore, the policies adopted by Royal Dutch Shell, an oil company, should be aligned with the standards and objectives for an energy transition that responds to the climate emergency²³⁹. Regarding Royal Dutch Shell's commitment to human rights, based on the UNGPs guidelines, the Court makes it clear that this responsibility is not optional. The decision calls for companies to take active steps to make it a reality, since business activities that violate human rights can be typified by corporate actions or omissions²⁴⁰.

The Court ruled that the company must reduce CO2 emissions from Shell group activities by 45% net by the end of 2030, compared to 2019, through the Shell group's corporate policies. This is an obligation of result and was applied to the Shell group's entire energy portfolio and the aggregate volume of all emissions (Scope 1 to 3). In the judgement, the Court states that this is a decision that requires the company to make better efforts with regard to the group's commercial relations. The judges consider that this responsibility does not revolve solely around Royal Dutch Shell, and that the application of this condemnation will not be able to stop the causes and consequences of global warming on its own. But this does not absolve it of its individual responsibility. Of all the cases analysed, this is the only one in which the climate claims have been upheld. At least so far. However, the other cases are worth exploring in order to

²³⁸ UNITED NATIONS (UN). **Paris Agreement**. 2015. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf; Accessed 23 Jan 2023.

²³⁹ PIRES, Julia Stefanello; PAMPLONA, Danielle Anne. Perspectivas da litigância climática em face de empresas: o caso Milieudefensie et al. vs. Royal Dutch Shell. **Revista de Direito Internacional**, Brasília, v. 19, n. 1, p. 145-163, 2022.

²⁴⁰ TRIBUNAL DE HAIA. Milieudefensie et al. Verweerder: Royal Dutch Shell. Proces: C/09/571932/HA ZA 19-379. "4.4.1". 26 maio 2021. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jan 2023.

understand the state of the art of climate liability in the main cases around the world.

- b) Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW) (2021), Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG (2021) and Kaiser, et al. v. Volkswagen AG (2021) cases

The cases Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW), Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG and Kaiser, et al. v. Volkswagen AG will be worked together, as they were built on similar logics. Regarding the plaintiffs, the first two actions were brought by Deutsche Umwelthilfe (DUH; Environmental Action Germany)²⁴¹, a non-profit environmental and consumer protection association. The third action was brought by three plaintiffs, who were associated with the NGOs Greenpeace Germany and Fridays for Future Germany, litigating on their own behalf, arguing that their legal interests are already being affected by the impacts of climate change today and are threatened by other concrete impacts²⁴².

The defendants in the three lawsuits (BMW, Mercedes-Benz and Volkswagen) are German automobile manufacturers and retailers who are responsible for a significant source of GHG emissions. Data collected by the European Parliament shows that, in 2019, means of transport were responsible for around a quarter of the EU's total CO₂ emissions, 71.7% of which came from road transport²⁴³. The three companies are global players, producing and selling cars in different locations around the world. As they are German companies, the lawsuits were filed in the regional courts of each company's tax domicile - Munich, Stuttgart and Braunschweig respectively.

Before looking at the case arguments, there is a need to take a step back and review the context prior to the filing of the lawsuits: the German Court's position in the

²⁴¹ Conforme informações disponibilizadas no site oficial da Deutsche Umwelthilfe (DUH; Environmental Action Germany): <https://www.duh.de/klimaklagen/klimaklagen-gegen-unternehmen/>; Accessed 23 Jan 2023.

²⁴² CLIMATE CHANGE LITIGATION DATABASE. Kaiser et al. v. Volkswagen AG. Available at: <https://www.greenpeace.de/publikationen/20220311statementofclaim.pdf>; Accessed 15 Jan 2024.

²⁴³ EUROPEAN PARLIAMENT. **CO₂ emissions from cars**: facts and figures (infographics). 2019. Available at: <https://www.europarl.europa.eu/news/en/headlines/society/20190313STO31218/co2-emissions-from-cars-facts-and-figures-infographics>; Accessed 15 Jan 2024.

case of Neubauer, et al. v. Germany (2020)²⁴⁴. This was a constitutional complaint brought in early 2020 by nine German teenagers and young adults before Germany's Federal Constitutional Court (Bundesverfassungsgericht). In the claim, the young people argued that the GHG reduction targets set by Germany violated human rights, saying that there were violations of the fundamental right to a future consistent with human dignity. In their decision, the Court established that Germany has a limited total CO2 emissions budget at its disposal and ordered the lawmakers to establish clear provisions for reduction targets from 2031 until the end of 2022.

As well as the order directed at federal legislators, the verdict made a very important point, which provided an argumentative basis for the cases discussed here. The court recognised the existence of a fundamental right to climate protection, centred on the impact of climate change on future generations. Another important element is that the obligation to take climate action (established in Article 20a of the German Basic Law²⁴⁵) must be understood from an international dimension. According to the Court, the fact that no state can solve the problems of climate change on its own does not invalidate each state's obligation to take climate action. The Court stated that "the State cannot evade its responsibility by pointing to greenhouse gas emissions in other States"²⁴⁶. This second point is extremely important for recognising the national responsibilities of each country. Obviously, actions taken individually, whether by states, companies or individuals, do not alone have the potential to mitigate the causes of climate change. However, this cannot serve as an argument for omission (or even acceptance) by any side.

This decision is in sharp contrast to a recent case in New Zealand, the Smith v. Fonterra Co-Operative Group Limited case (2022)²⁴⁷. The lawsuit was brought by the

²⁴⁴SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** Neubauer, et al. v. Germany. 2020. Available at: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>; Accessed 15 Jan 2024.

²⁴⁵DEUTSCHER BUNDESTAG. Lei Federal da República Federal Alemã. Tradução oficial da Versão alemã de 23 May 1949. Edição de junho de 2022. Available at: <https://www.btg-bestellservice.de/pdf/80208000.pdf>; Accessed 10 Feb 2024.

²⁴⁶SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** Neubauer, et al. v. Germany. 2020. Available at: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>; Accessed 10 Feb 2024.

²⁴⁷SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** COURT OF APPEAL OF NEW ZEALAND. Smith v. Fonterra Co-Operative Group Limited: Judgment Of The

spokesperson for the Iwi Chairs Forum, a Maori development platform, against seven high-emission New Zealand companies in the agriculture and energy sectors. The plaintiffs' arguments were that the way in which the defendants conduct their commercial activities interferes with the public's rights or violates legal duties owed. They further argued that these activities have caused and will cause the plaintiff and others to suffer loss and damage. The court ruled that the climate crisis simply cannot be properly or adequately addressed by common law claims brought before the courts. The decision pointed out that the case involved a scenario in which every person in New Zealand is (to different degrees) both responsible for causing the damage and the victim of that damage, a factor that would make it impossible to fulfil the requirements to apply the provision.

In the New Zealand case²⁴⁸, the court takes a conservative stance, refusing to apply new principles and normative concepts that arise from the global climate emergency. On the other hand, there is the position of the German court in the Neubauer case, which seeks to understand the challenges that must be faced in response to the climate threat. Yes, it is true that a single actor is not entirely responsible for the emissions that intensify the greenhouse effect, whether this actor is a state, company or individual. However, this cannot serve as a reason for this actor to avoid fulfilling its obligations to mitigate the causes of climate change, especially when it comes to major emitters.

Back to the German cases, the results of the Neubauer trial brought a new range of possibilities in the pursuit for climate responsibility before the German Court. The cases *Deutsche Umwelthilfe v. Bayerische Motoren Werke AG (BMW)*, *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG* and *Kaiser, et al. v. Volkswagen AG* are based primarily on concepts recognised in the Neubauer case. The three cases argue that the defendant companies (BMW, Mercedes-Benz and Volkswagen) are infringing the right to climate protection by not committing to achieving carbon neutrality in the

Court. 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211021_2020-NZHC-419-2021-NZCA-552-2022-NZSC-35_appeal-1.pdf; Accessed 09 Jan 2024.

²⁴⁸ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform: COURT OF APPEAL OF NEW ZEALAND.** *Smith v. Fonterra Co-Operative Group Limited: Judgment Of The Court.* 2021. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211021_2020-NZHC-419-2021-NZCA-552-2022-NZSC-35_appeal-1.pdf; Accessed 09 Jan 2024.

production and intended use of internal combustion engine cars. The cases are based on the German Basic Law, Article 20a of which deals with the protection of vital natural resources and animals:

Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.²⁴⁹

Based on the Neubauer case, in the BMW and Mercedes-Benz cases the plaintiffs argued that the German State can and should interfere with fundamental rights to fulfil its climate obligations. Their conclusion follows an assessment of the facts²⁵⁰: the severity of climate change impacts and the threat of human rights violations for current and future generations. Therefore, given that there is a global "budget" for GHG emissions, the more emission reserves are saved, the more lenient this interference can be²⁵¹. The plaintiffs' argument not only addresses the impacts on human rights related to climate change, but also focuses on the impacts related to efforts and obligations to achieve climate goals. If mitigating the causes of climate change is a collective endeavour, which will entail sacrifices imposed by states on individuals, companies should also have this responsibility assigned to them.

Although the argument is not specifically based on the UNGPs and corporate responsibility to respect human rights, an interesting point is the extension of climate responsibility to the use of products traded by the companies. The emissions of the defendant companies occupy a significant percentage of the country's reserves, mainly in

²⁴⁹ DEUTSCHER BUNDESTAG. Basic Law for the Federal Republic of Germany. Official translation from the German version of 23 May 1949. Edição de junho de 2022. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html; Accessed 01 Feb 2024.

²⁵⁰ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform**: Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW). 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/>; Accessed 09 Jan 2024, e SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform**: Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG. 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>; Accessed 01 Feb 2024.

²⁵¹ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform**: Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW). 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/>; Accessed 09 Jan 2024, e SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform**: Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG. 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>; Accessed 01 Feb 2024.

the use of the vehicles produced and marketed by the defendants. Thus, the defendant companies would have been causally contributing to these results. Their responsibility would therefore rest on their business decisions about production and investment.²⁵²

The requests in both lawsuits were: a court order that between 1 January 2022 and 31 October 2030, the defendant companies build new passenger cars with a certain limit on CO₂ emissions. Or, as a subsidiary request, that they prove greenhouse gas neutrality for any CO₂ emissions beyond the determined values.²⁵³ DUH used the Paris Agreement targets as a basis for establishing the metrics that should be used.

²⁵² SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform:** Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW). 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/>; Accessed 09 Jan 2024, and SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform:** Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG. 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>; Accessed 01 Feb 2024.

²⁵³ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform:** Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW). 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/>; Accessed 09 Jan 2024, and CLIMATE CHANGE LITIGATION DATABASE. Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG. 2021. Available at: <https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>; Accessed 01 Feb 2024.

CHAPTER 3: CORPORATE CLIMATE LIABILITY

“To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts.”

(Stockholm Declaration Preamble, 1972)

As a liability, this research understands that it refers to a responsibility "towards" or "in relation to" another person, covering two aspects²⁵⁴. On the one hand, the duty to prevent the impact is to abstain from causing a violation of another person's right, as discussed in the previous chapter. The first aspect was dealt with in the second chapter, which refers to the duty to mitigate. On the other hand, if there is an impact on the rights of others, whether by action or omission, then legal liability covers the idea of the duty to repair this damage. This second aspect is dealt with in this chapter.

Tort liability, the whole of these duties to mitigate the causes and repair the damage, is based on a set of duties that must be recognised when thinking about it. According to Pier Giuseppe Monateri²⁵⁵, civil liability has three functions: compensatory, sanctioning and preventive. In the first function, damages are transferred from the victim to the offender. In the second function, also called punitive or pedagogical, in connection with the first, the purpose is to punish the perpetrator for the wrong committed. Though there are controversies regarding this function, such debates will not be addressed here. And finally, the third function is to ensure that such damage does not happen again. For this to happen, the institute of civil liability must be strong enough to prevent further offences²⁵⁶.

Yet, issues of legal attribution regarding the impacts and damage to human rights related to climate change, as well as aspects of reparations and loss and damage, have not been addressed by international institutions or agreed upon in State practice²⁵⁷.

²⁵⁴BRUNNÉE, Jutta. GOLDBERG, Silke. LORD, Richard. RAJAMANI, Lavanya. Overview of legal issues relevant to climate change. In: **Climate change liability**: transnational law and practice / [edited by] Richard Lord ... [et al.]. y Cambridge University Press, New York, 2012.

²⁵⁵ MONATERI, Pier Giuseppe. **La responsabilità civile**. Utet Giuridica, Dec. 2006.

²⁵⁶ TARTUCE, Flávio. **Responsabilidade Civil**. 5 rev., atual., ampl. Rio de Janeiro: Forense, 2023.

²⁵⁷ TÜRKELLI, Gamze Erdem. KRAJEWSKI, Markus. VANDENHOLE, Wouter. Beyond ‘Global Good Samaritans’: Transnational Human Rights Obligations, **Journal of Human Rights Practice**, Volume 15,

However, climate litigation has raised concerns about extraterritorial issues, future and intergenerational damages, as well as the aspects and limits of corporate accountability, based on the distribution of climate risks.

Here its liability aspect will be looked. Civil liability aims to repair damage caused by an unlawful act, or even in the abusive exercise of the plaintiff's right. Its elements are: the unlawful act, the damage and the causal link²⁵⁸. The complexity of modern relationships, including technological and climatic issues, has led to a number of challenges in the debate on liability for damage caused to third parties. Although climate adaptation is a key component of climate solutions, there is still a need to establish who should be responsible for implementing these adaptation measures in response to climate change-related damage.

In Brazil, in line with international standards, the PNMC²⁵⁹ defined adaptation as "initiatives and measures to reduce vulnerabilities of natural and human systems to the current and expected effects of climate change". For human systems, adaptation aims to reduce or prevent damage related to climate change. According to UN Resolution 41/21 on Human Rights and Climate Change²⁶⁰, as a result of climate imbalance, impacts on natural and human systems can obstruct the enjoyment of human rights, such as the right to food, clean water and even life. How this damages, and their relationship to human rights, are shaped will be discussed below.

International documents, as well as internal regulations, seek to establish solutions to this question, such as climate finance, technical cooperation and technology exchanges between countries, etc. One shortcoming identified by the IPCC is that many initiatives prioritise the immediate and short-term reduction of climate impacts, thereby reducing the opportunity for truly transformative adaptation²⁶¹. Without many effective

Issue 3, November 2023, Pages 794–804.

²⁵⁸ MONATERI, Pier Giuseppe. **La responsabilità civile**. Utet Giuridica, Dec. 2006.

²⁵⁹ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/12187.htm; Accessed 10 Jan 2024.

²⁶⁰ ORGANIZACIÓN DE LAS NACIONES UNIDAS (ONU) CONSEJO DE DERECHOS HUMANOS. **Resolução n. n. 41/21 de 2019**. Los derechos humanos y el cambio climático. A/HRC/RES/41/21.

²⁶¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S.

solutions to actually establish permanent adaptation, the idea of symbolic²⁶² regulations become even more evident in this context. This must be seen in the light of the many layers between the primary production process, which is highly GHG-emitting, and the final consumer product, as well as the causal relationship between GHG-emitting activities and the (future and uncertain) results of climate change. The lack of a link between emitting activities and the consequences of climate change leads to a failure on the part of these actors to fulfil their climate commitments.

It must, therefore, look for effective means of accountability so that standards are not used merely as a symbol of corporate commitment, without any real care about activity risks. This chapter explores liability for damages related to climate change. Based on the link between GHG-emitting activities and climate change and the fact that the environmental damage they cause is an intolerable risk to diffuse rights or intergenerational equity, the structure of cases already under discussion in other countries will be analysed.

There are three parts to the chapter. In the first section, it will explore the concept of climate adaptation and how this commitment is related to damage mitigation. The second topic will explore the elements that characterise liability: damage, unlawful act and causal link, from a climate perspective. Finally, the research will look at paradigm cases from the international landscape to understand how this aspect of corporate climate liability has been applied in other countries.

3.1. Remedy for human rights impacts: climate adaptation and corporate responsibility

The Paris Agreement's Article 2²⁶³ states that one of its goals is to increase the capacity to adapt to climate change's negative impacts and promote resilience to

Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)). In: **Climate Change 2022: Impacts, Adaptation and Vulnerability**. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33.

²⁶² FERREIRA, Helene Sivini. A dimensão ambiental da teoria da sociedade de risco. In: FERREIRA, Helene Sivini; FREITAS, Cinthia Obladen de Almendra (orgs.). **Direito Socioambiental e Sustentabilidade**: Estados, Sociedades e Meio Ambiente. Curitiba: Letra da Lei, 2016. p. 151

²⁶³ UNITED NATIONS (UN). **Paris Agreement**. 2015. Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf. Accessed 23 Jan 2024.

climate change and low greenhouse gas emission development. The document also recognises the need for immediate action and is closely related to the mitigation measures implemented. The more effective current mitigation measures are, the less need there will be for future adaptation. In the climate context, the two aspects of accountability are intertwined and require broad and complex action capable of mitigating and repairing climate impacts.

According to the IPCC, in a climate context adaptation means reducing "climate risks and vulnerability, in particular by adjusting existing systems"²⁶⁴. The UN believes that these measures can refer to small decisions taken in an individual context, such as planting trees, planning outdoor activities at times when the weather is warmer, etc. As well as more complex actions, such as building bridges, dams and other structures that are necessary due to new environmental configurations resulting from climate impacts. Some communities may even be forced into involuntary displacement if it becomes impossible to stay in their place of origin.²⁶⁵

Adaptation refers to damage that already exists in order to mitigate the intensity with which it is felt, as well as future damage or damage that is in the process of being materialised. On the other hand, besides reducing risks and damages, exploring adaptation measures can lead to additional positive impacts, such as improved agricultural productivity, innovation, health and well-being, food security, livelihoods and biodiversity conservation²⁶⁶. When structured correctly, these measures should be

²⁶⁴INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: **Climate Change 2022: Impacts, Adaptation and Vulnerability**. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33.

²⁶⁵ UNITED NATIONS. **Climate Adaption**. Available at: <https://www.un.org/en/climatechange/climate-adaptation>; Accessed 15 Feb 2024.

²⁶⁶ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: **Climate Change 2022: Impacts, Adaptation and Vulnerability**. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33.

able to act as a way of mitigating impacts and promoting the human rights of affected parties. To do this, the full complexity of the areas, communities and individuals impacted must be considered. Based on the UNGPs' guidelines, these solutions must be designed and built from the perspective of human rights holders.

In some areas, adaptation measures are essential for the very existence of human life or the permanence of communities. People in vulnerable situations, such as children and people with disabilities, are even more likely to have their human rights violated as a result of these impacts. The *Unless we act now* study, carried out by UNICEF in 2015²⁶⁷, indicates that more than half a billion children live in extremely high flood zones and almost 160 million live in regions with high or extremely high drought severity zones.

In addition, these areas often have low levels of basic sanitation, no schools, poor access to essential services, and high poverty rates. Climate impacts add to and increase already existing situations of vulnerability. The IPCC notes that adaptation is unevenly distributed and that the major gaps have been registered in the population groups with the lowest incomes.²⁶⁸

Climate (in)justice, as described in the first chapter, exposes the distinct intensity with which climate change is felt in different places. These impacts, especially on human rights, are both cumulative and can result in states of violation never before experienced by that individual or community. For example, intense droughts and long dry spells caused by the alteration of the water cycle can intensify the lack of drinking water in places where there was already a shortage, as well as jeopardising food production in regions that were used to regular rainy periods. In both cases, the impacts are not just local and can influence a chain of human rights violations. Future generations will bear

²⁶⁷ UNICEF. **Unless we act now: the impact of climate change on children**. 2015. Available at: https://www.unicef.org/publications/index_86337.html; Accessed 22 Jun 2023.

²⁶⁸ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: **Climate Change 2022: Impacts, Adaptation and Vulnerability**. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33.

the brunt of these factors, which makes the intergenerational approach to climate justice increasingly relevant.

To make these measures truly effective and meet the needs of the human rights holders affected, the full complexity of these rights needs to be considered. Also, as the actors responsible for financing and implementing these measures, it must be considered that not only states have this responsibility, but also companies. As described in chapter two, principles of environmental law recognise this shared responsibility, such as the principle of solidarity. Within the framework of the voluntary documents, the guidelines established in the UNGPs, which have already been discussed, this responsibility to adapt can be related to the duty to remedy, described in the third pillar of the document.

Guiding Principle 15 states that in order to fulfil their responsibility to respect human rights, companies must have policies and processes that are appropriate to their size and circumstances. This includes "processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute"²⁶⁹. Similarly, Principle 22 states that companies should remedy or contribute to remediation through legitimate processes whenever they are found to have caused or contributed to an impact on human rights. The UNGPs also establish criteria for prioritising remediation plans, stating that companies should first address "those that are most severe or where delayed response would make them irremediable"²⁷⁰.

Although it was delimited that this study will not address procedural issues, a remark must be made regarding the importance of the enforceability of this type of legal thesis. Although Brazil is located in the Global South²⁷¹, in a context where the knowledge and methodologies of the Global North still prevail in some aspects, especially

²⁶⁹ UNITED NATIONS (UN). **Guiding principles on business and human rights**: implementing the United Nations "protect, respect and remedy" framework. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 March 2022.

²⁷⁰ UNITED NATIONS (UN). **Guiding principles on business and human rights**: implementing the United Nations "protect, respect and remedy" framework. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 March 2022.

²⁷¹ BINAGHI, Emilio. Algunos problemas con la noción de Sur Global. *Das Questões*, [S. l.], v. 8, n. 1, p. 107–112, 2020. Available at: <https://periodicos.unb.br/index.php/dasquestoes/article/view/31100>; Accessed : 20 Feb 2024.

economic ones, the country's strategic position should be considered. As well as occupying prominent economic positions in Latin America, Brazilian companies are also among the world's top GHG emitting industries²⁷². As such, there is no ignoring the importance of these companies' responsibility to respect human rights, mitigating their contribution and repairing the impacts related to climate change.

Although understanding that companies have a responsibility to implement climate adaptation measures in order to repair impacts and fulfil their responsibility to respect human rights, this provision is not set out in a legal regulation. The Brazilian legal context, like other countries, has no mandatory elements that establish this obligation, considering the characteristics of the climate context. The lack of any specific normative solutions cannot, however, be an obstacle to implementing solutions. The next topic will explore how this liability for human rights impacts related to climate change can be applied through civil liability, as provided for in Brazilian civil law.

3.2. Civil climate liability in Brazilian law: the problem of conceiving the unlawful act, the damage and the causal link

Holding multinational or transnational companies' liable presents additional challenges due to the multiplicity of jurisdictions involved in their activities. They also generally have great economic power and influence over states that are eager to attract foreign capital²⁷³. Lacking internal rules to regulate these activities, companies, especially multinationals, move freely between territories, according to the regulations that are most favourable to them. Even if the holding company, or parent company, is founded and based in a country with stricter regulations, its subsidiaries, or suppliers, may be in countries with more lenient laws, leaving room for human rights violations. Although in recent decades there has been a growing number of regulations and new laws that

²⁷² INSTITUTE FOR AGRICULTURE AND TRADE POLICY (IATP) e a CHANGING MARKETS FOUNDATION. **Emissões Impossíveis:** Como a indústria de carne e de laticínios está aquecendo o planeta. Agosto de 2018. [grain-6011-emissoes-impossiveis-como-a-industria-de-carne-e-laticinios-esta-aquecendo-o-planeta.pdf](https://www.iatp.org/publications/grain-6011-emissoes-impossiveis-como-a-industria-de-carne-e-laticinios-esta-aquecendo-o-planeta.pdf) (iatp.org); Accessed : 20 Feb 2024.

²⁷³ PAMPLONA, Danielle Anne. SILVA, Ana Rachel Freitas da. Os princípios orientadores das nações unidas sobre empresas e direitos humanos: houve avanço?. In: BENACCHIO, Marcelo (coordenador), VAILATTI, Diogo Basílio. DOMINQUINI, Eliete Doretto (organizadores). **A sustentabilidade da relação entre empresas transnacionais e Direitos Humanos**. Curitiba: CRV, 2016.

determine the responsibility of companies for their value chains, even outside their territory, this is not yet a reality in the Brazilian legal system.

It is therefore necessary to seek solutions within the existing regulatory system. The research will now explore how corporate civil liability applies in cases of human rights impacts related to climate change. Firstly, in the hierarchy of norms, the protective elements established in Brazil's Federal Constitution will be extrated. By establishing the environment as a fundamental right, the Brazilian Constitution provides in Article 225, § 3 that conduct, and activities considered harmful to the environment will subject offenders, whether individuals or companies, to the obligation to repair the damage caused²⁷⁴. As has already been discussed in this study, climate change undeniably has an impact on the environment. Activities that emit GHGs can therefore be considered harmful to the environment and fall within the constitutional precepts.

Although the PNMC²⁷⁵ does not establish sanctions, it also sets out conceptual guidelines that should drive the application of the law. Article 2 provides important definitions for understanding this climate liability. Adaptation means "initiatives and measures to reduce the vulnerability of natural and human systems to the current and expected effects of climate change". Vulnerability is defined as:

(...) a system's degree of susceptibility to and inability to cope with the adverse effects of climate change, including climate variability and extreme events, depending on its sensitivity, adaptive capacity and the nature, magnitude and rate of change and variation of the climate to which it is exposed.

Regarding the sanctions established in Brazilian legislation, Civil Liability is provided for in the Civil Code of 2002, in Title IX "Civil Liability", which sets out in Chapter I the obligation to provide compensation. Article 927 establishes that "whoever, through an unlawful act (articles 186 and 187), causes damage to another, is obliged to repair it". This study also focuses on non-contractual liability, i.e. liability arising from an unlawful act, a non-fulfilment of a legal duty or a direct violation of a legal rule without

²⁷⁴ BRASIL. Constituição da República Federativa do Brasil de 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; Accessed 20 Feb 2024.

²⁷⁵ Translated by the author from: BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

there being a prior relationship between the victim and the offender²⁷⁶. Aspects of contractual liability will not be analysed.

The use of civil liability in environmental matters has been explored for some time in Brazilian doctrine. In its application, the protected legal good is the so-called "environmental good", a good of common use and of a transindividual nature, as determined in article 225 of the Federal Constitution²⁷⁷. This delimitation defines the protection of the environmental good as collective protection. However, liability for impacts related to climate change is not a collective defence, nor does it refer to abstract damages. Damages will be dealt with later. Right now, the research is defining that in the case of impacts on human rights related to climate change, it should be considered that the damage caused may refer to individual damage. The possibilities of class actions are not excluded²⁷⁸, but this is not the scope of this study.

After understanding the general aspects set out in the Brazilian legal system, moving on to analyse the legal elements necessary to establish civil liability: the absence of intent/guilt, the establishment of a climate unlawful act, the nature of climate damage and the causal link. This analysis will be based on the particular characteristics of the solutions demanded by the climate emergency, understanding how this new paradigm can be dealt with in the Brazilian legal context.

a) Objective climate liability

Those who cause damage to others can be held liable either on an objective or subjective basis. Subjective civil liability requires that the damaging behaviour was carried out with intent or fault by the perpetrator²⁷⁹. Regarding the environmental damage caused by climate change, Article 14, Paragraph 1 of Law 6.938/1981, which sets out the

²⁷⁶ MESSIAS, E. R.; DIAS, J. A. Responsabilidade Civil Contratual e Extracontratual Frente à Responsabilidade Civil Ambiental: Uma Análise sob o Direito Pós-Moderno. **Revista Direitos Fundamentais & Democracia**, [S. l.], v. 24, n. 1, p. 243–265, 2019. Available at: <https://revistaeletronicardfd.unibrazil.com.br/index.php/rdfd/article/view/1276>; Accessed 21 Feb 2024.

²⁷⁷ TARTUCE, Flávio. **Responsabilidade Civil**. 5 rev., atual., ampl. Rio de Janeiro: Forense, 2023.

²⁷⁸ WEDY, Gabriel. **Litígios Climáticos**: de acordo com o Direito brasileiro, norte-americano e alemão. Salvador: editora JusPodium, 2019.

²⁷⁹ TARTUCE, Flávio. **Responsabilidade Civil**. 5 rev., atual., ampl. Rio de Janeiro: Forense, 2023.

National Environmental Policy²⁸⁰, establishes that the polluter is obliged, regardless of fault, to provide compensation or reparation for the damage caused to the environment and third parties affected by their activity. Based on these rules, doctrine and judicial decisions have enshrined the applicability of objective civil liability in the case of environmental damage²⁸¹. The liability system must be strict given the environmental good's scope of protection²⁸², enshrined in the Federal Constitution as a fundamental right.

However, when it comes to climate change-related impacts, these go beyond the environmental good, involving human rights impacts on individuals or groups. The research will now discuss the definition of objective civil liability for climate change, seeking to protect human rights.

According to article 186 of the Brazilian Civil Code, this is defined as "voluntary action or omission, negligence or recklessness". Article 187 defines that the harmful act may result from a regular exercise of the author's right when, in exercising it, "it manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good customs".²⁸³

As for objective civil liability, its applicability is defined in the sole paragraph of Article 927 of the Civil Code. The norm establishes that there is an obligation to repair the damage, regardless of fault, in cases specified by law, "(...) or when the activity normally carried out by the author of the damage implies, by its nature, a risk to the rights of others".²⁸⁴

²⁸⁰ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

²⁸¹ TARTUCE, Flávio. **Responsabilidade Civil**. 5 rev., atual., ampl. Rio de Janeiro: Forense, 2023.

²⁸² LEMOS, Patrícia Faga Iglecias. Mudanças climáticas e responsabilidade civil por dano ao meio ambiente. In: LIVRATTI, Paula; PRESTES, Vanêsa Buzelato (Org.). **Direito e mudanças climáticas** [recurso eletrônico]: responsabilidade civil e mudanças climáticas. São Paulo: Instituto O Direito por um Planeta Verde, 2010.

²⁸³ Translated by the author from: BRASIL. Código Civil. 2002. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm#:~:text=1%20o%20Toda%20pessoa%20%C3%A9,concep%C3%A7%C3%A3o%2C%20os%20direitos%20do%20nascituro.; Accessed 10 Jan 2024.

²⁸⁴ BRASIL. Código Civil. 2002. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm#:~:text=1%20o%20Toda%20pessoa%20%C3%A9,concep%C3%A7%C3%A3o%2C%20os%20direitos%20do%20nascituro.; Accessed 10

What this "risk" would be in the civil context is studied by "risk theories", which assess the elements for its applicability. How the risk theory is applied to civil liability can help determine which theories should be observed. For example, in cases where the state is the author of the damage, the theory of administrative risk applies, as set out in Article 37, § 6 of the Federal Constitution²⁸⁵. Here, the focus is on the risk concept applicable to companies, due to their contributions to climate causes.

Article 927, sole paragraph, of the Brazilian Civil Code, as quoted above, refers to the activity risk or professional risk theory²⁸⁶. In the first chapter, the concept of climate risk was presented. These risks are measured by analysing the causal link and the cause itself. The causal link, discussed in greater depth later in a specific topic, refers to isolated conditions that are related to each other. Causes, on the other hand, have a demand for change, as well as a system of action in which this cause arises²⁸⁷. The risk relationship essentially has a future component, an anticipation, "destructions that have not yet occurred but are imminent"²⁸⁸ and because of their imminence, they become real at the present moment. Choosing to take an action means assuming the risks associated with it, and thereby accepting that they can be materialised.

For decades, research has shown that climate risks are based on GHG emission rates. The Kyoto Protocol in 1995²⁸⁹, based on specialised scientific studies, already established the need to set emission targets to curb climate change. The emblematic IPCC report of 2007²⁹⁰ showed the relationship between business activities and high rates of GHG emissions. The report also emphasised the lack of voluntary

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²⁸⁵ TARTUCE, Flávio. **Responsabilidade Civil**. 5 rev., atual., ampl. Rio de Janeiro: Forense, 2023.

²⁸⁶ Como, por exemplo, o projeto "Carbon Majors Database" Available at: https://climateaccountability.org/pdf/CDP_CAI%20CarbonMajorsDatasetRpt%20v1.0%20Mar17.pdf; Accessed 10 Jan 2024.

²⁸⁷ BECK, Ulrich, **Sociedade de Risco**: rumo a uma outra modernidade.

²⁸⁸ BECK, Ulrich, **Sociedade de Risco**: rumo a uma outra modernidade. p. 39.

²⁸⁹ KYOTO PROTOCOL. Berlin, 1995. Available at: http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/Protocolo_Quito.pdf; Accessed 10 Jun 2023.

²⁹⁰ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2007: Mitigation**. Contribution of Working Group III to the Fourth Assessment. Report of the Intergovernmental Panel on Climate Change, Cambridge, Nueva York, Cambridge university Press, 2007.

agreements signed by states and industry sectors to achieve satisfactory levels of emission reductions.

There is no doubt that the climate risks involved in high GHG emitting activities are common knowledge. For some years now, rankings and studies have been nominally pointing out who the biggest companies are in terms of GHG emissions, with historical and current data²⁹¹. Data from the Carbon Major Database, published in 2017, shows that since the existence of human-caused climate change has been recognised, more than a third of oil and gas emissions can be traced back to just eight companies. The term "Carbon Majors", created precisely from the climate context, refers to companies that have made significant profits over decades through the extraction and production of products that are major GHG emitters, and usually include mining or fossil fuel companies on their lists²⁹².

If there is a scientific consensus on the existence of this climate risk, there is also no question about the informed decision of companies to take these risks. In 2023, the World Benchmarking Alliance published the Climate and Energy Benchmark report²⁹³, analysing 450 of the world's most influential key companies in high-emission sectors such as automotive, electricity utilities, oil and gas, transport, buildings and construction. The study was based on the companies' adherence to the Paris Agreement guidelines. The results showed that most of these companies have climate commitments and targets, although they still fall short of the needed ambition.

Therefore, businesses not only assume climate risk, but also publicly commit to mitigate it, without actually taking effective action. The fact is that these commitments are generally voluntary. Therefore, if they are not fulfilled, there is no provision for sanctioning these companies. Climate litigation is trying to change this. The Global

²⁹¹ GRIFFIN, Paul. **CDP Report: The Carbon Majors Database**. CDP. Julho de 2017. <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf>; Accessed 25 Sept 2023.

²⁹² GRIFFIN, Paul. **CDP Report: The Carbon Majors Database**. CDP. Julho de 2017. <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf>; Accessed 25 Sept 2023.

²⁹³ WORLD BENCHMARKING ALLIANCE (WBA). **Climate and Energy Benchmark**. 2023 Available at: <https://www.worldbenchmarkingalliance.org/climate-and-energy-benchmark/>; Accessed 10 Jan 2024.

Trends in Climate Litigation²⁹⁴ report highlights five areas of corporate climate litigation that are experiencing an increase in cases, among which are cases that explore legal strategies for "loss and damage" claims resulting from climate change.

Although it does not expressly address civil liability for damages, the case of *Milieudefensie et al. v. Royal Dutch Shell* stands out in shaping this climate accountability. The company publicly declared a commitment to the Paris Agreement and to human rights, based on the UNGPs. These documents are, therefore, used to address what the company should do based on the duty of care established in Dutch law. Although these documents are not binding, they contain elements that should become part of the company's actions.

The Paris Agreement states that mitigating the causes of climate change will not be achieved by states alone, but that it must involve other actors' commitment to cut emissions. Within this context, the policies adopted by Royal Dutch Shell, an oil company, should be aligned with standards and objectives for an energy transition that meets the climate emergency²⁹⁵. As for the responsibility to respect human rights, set out in the UNGPs, it is not an optional responsibility. It requires active action by companies to make it a reality, since business activities that violate human rights can be defined as corporate actions or omissions²⁹⁶. Furthermore, doctrine and case law have established that all polluters who contribute to environmental damage are jointly and severally liable. The theory of integral risk is also applied, which dismisses exclusions of illegality²⁹⁷.

Therefore, when the theory of risk based on Article 927 of the Brazilian Civil Code is interpreted, it is clear that climate risks must also be considered. When companies engage in highly GHG-emitting activities in their normal operations, they

²⁹⁴ SETZER, Joana. HIGHAM, Catherine. **Global Trends in Climate Change Litigation: 2022 Snapshot**. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022.

²⁹⁵ PIRES, Julia Stefanello; PAMPLONA, Danielle Anne. Perspectivas da litigância climática em face de empresas: o caso *Milieudefensie et al. vs. Royal Dutch Shell*. **Revista de Direito Internacional**, Brasília, v. 19, n. 1, p. 145-163, 2022.

²⁹⁶ TRIBUNAL DE HAIA. *Milieudefensie et al. Verweerder: Royal Dutch Shell*. Proces: C/09/571932/HA ZA 19-379. "4.4.1". 26 maio 2021. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>; Accessed 23 Jul 2021

²⁹⁷ SARLET, Ingo Wolfgang. WEDY, Gabriel. FENSTERSEIFER, Tiago. **Curso de Direito Climático**. São Paulo: Thomas Reuters, 2023.

assume the risk of climate impacts, which by their nature imply a risk to others' rights. Objective civil liability therefore applies, as a result of climate risk. As for the basic elements: unlawful act, climate damage and causal link, they will be discussed in greater detail below.

b) Unlawful acts and abuse of rights in climate contexts

Unlawful acts are established in articles 186 and 187 of the Brazilian Civil Code. Article 186 states that an unlawful act is committed by anyone who violates a right and causes damage to another, through "(...) voluntary action or omission, negligence or recklessness". Article 187 adds that a unlawful act is also committed by those who abuse the exercise of their rights. As outlined above, in the case of objective civil liability, there is no need to assess the presence of intent or fault in committing the unlawful act.

Note that the article uses the adjective conjunction "and" to establish that the illicit act is configured by a violation of law and damage. In the Brazilian legal context, the possibility of an unlawful act by the mere violation of another person's right is ruled out²⁹⁸. It is, therefore, necessary for this violation to be followed by concrete damage. Climate damage will be discussed in the next section.

Objective civil liability is applicable when protecting the environment, as discussed above. This means that when environmental damage is caused, there is no distinction between a lawful act, an unlawful act and abuse of rights. Brazilian environmental law therefore makes room for damage resulting from lawful activities. Patrícia Lemos exemplifies that this can occur in "(...) situations in which the entrepreneur has a licence and carries out his activity within the limits of this licence and, even so, can be held responsible whenever the environment does not absorb his impacts"²⁹⁹. This idea is perfectly applicable when it comes to establishing climate liability. Once the damage has been identified (impacts on human rights related to climate change), the act that

²⁹⁸ TARTUCE, Flávio. **Responsabilidade Civil**. 5 rev., atual., ampl. Rio de Janeiro: Forense, 2023.

²⁹⁹ LEMOS, Patrícia Faga Iglecias. Mudanças climáticas e responsabilidade civil por dano ao meio ambiente. In: LIVRATTI, Paula; PRESTES, Vanêsa Buzelato (Org.). **Direito e mudanças climáticas** [recurso eletrônico]: responsabilidade civil e mudanças climáticas. São Paulo: Instituto O Direito por um Planeta Verde, 2010. – (Direito e Mudanças Climáticas; 2).

causes this damage (GHG emitting activities) does not necessarily have to be classified as a unlawful act.

A further important aspect is that Article 187 states that the abuse of rights can also be classified as a civil offence. It states that this abuse would occur if the right holder exercised the right by "(...) manifestly exceeding the limits imposed by its economic or social purpose, by good faith or by respectable customs". However, the law does not specify what these limits are, or the parameters for defining them. Once again, there is a general clause in Brazilian civil law with an open concept³⁰⁰. This type of clause must be interpreted and applied according to the context and specificities of the case.

In the legal context of climate change, the misuse of property rights can be discussed³⁰¹. Environmental damage occurs when this limit of tolerance in the regular enjoyment of the right is exceeded. The Civil Code stipulates that the limits are the economic or social purpose, good faith or good customs. Therefore, it applies to cases in which the social purpose of property is being abused. This abuse occurs when the unlawfulness that corrupts the act results from the violation of legal values that compose the law, and which sustain our life as a community³⁰². Following this line of thought, an abuse of rights would occur when a company, aware of the impacts related to climate change, keeps investing in and expanding highly GHG emitting activities

Furthermore, it could also incur abuse if companies are aware of climate change's causes and consequences and take on public commitments to climate and human rights. This abuse would occur if not implemented because they are not acting within the

³⁰⁰ MUNARO, F. A cláusula geral do abuso de direito como função longa manus do instituto da responsabilidade civil. **Scientia Iuris**, [S. l.], v. 11, p. 57–72, 2007. Available at: <https://ojs.uel.br/revistas/uel/index.php/iuris/article/view/4147>; Accessed 21 Feb 2024.

³⁰¹ LEMOS, Patrícia Faga Iglecias. Mudanças climáticas e responsabilidade civil por dano ao meio ambiente. In: LIVRATTI, Paula; PRESTES, Vanêsa Buzelato (Org.). **Direito e mudanças climáticas** [recurso eletrônico]: responsabilidade civil e mudanças climáticas. São Paulo: Instituto O Direito por um Planeta Verde, 2010. – (Direito e Mudanças Climáticas; 2).

³⁰² FARIA, Dárcio Augusto Chaves. A função social como princípio legitimador da propriedade. APUD LEMOS, Patrícia Faga Iglecias. Mudanças climáticas e responsabilidade civil por dano ao meio ambiente. In: LIVRATTI, Paula; PRESTES, Vanêsa Buzelato (Org.). **Direito e mudanças climáticas** [recurso eletrônico]: responsabilidade civil e mudanças climáticas. São Paulo: Instituto O Direito por um Planeta Verde, 2010. – (Direito e Mudanças Climáticas; 2).

bounds of good faith. Good faith prohibits contradictory behaviour³⁰³, and imposes duties so that legal relationships established under civil law are guided by care, clarity and certainty. Environmental law also includes the principle of *in dubio pro natura*³⁰⁴, which can also be applied to climate issues, with the criterion that the most protective of the environment is always prevailing.

The world is currently going through a review of what role business should play and the limits of its responsibility to respect human rights. Although much remains to be discussed and settled here, questions that have already been established in civil law are setting limits to be drawn in terms of configuring this liability based on legal aspects. Applying these premises will be explored in greater depth in chapter four. First, however, it is necessary to understand the legal definition of climate damage.

a) Climate damage: the impact on human rights

As explained above, for civil liability to be established within Brazilian law, the right violation must result in damage. The most prominent element of all the aspects presented here is climate damage. In addition to the normative provision of the Civil Code, other rules point to the concept.

Under Article 2 of the PNMC, the term "adverse effects of climate change" refers to changes in the physical environment or biota resulting from climate change that have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems, on the functioning of socio-economic systems or on human health and well-being. The PNMC also defines climate impacts as "the effects of climate change on human and natural systems".³⁰⁵

Added to this context is the ADPF 708 decision in 2022³⁰⁶, which was already

³⁰³ DINIZ, Carlos Eduardo Iglesias. A Boa-Fé Objetiva No Direito Brasileiro e a Proibição De Comportamentos Contraditórios. In: **EMERJ**. Série Aperfeiçoamento de Magistrados. 2013. 10 Anos do Código Civil - Aplicação, Acertos, Desacertos e Novos Rumos Volume I.

³⁰⁴ SARLET, Ingo Wolfgang. WEDY, Gabriel. FENSTERSEIFER, Tiago. **Curso de Direito Climático**. São Paulo: Thomas Reuters, 2023.

³⁰⁵ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/12187.htm; Accessed : 10 Jan 2024.

³⁰⁶ SUPREMO TRIBUNAL FEDERAL (STF). Arguição de Descumprimento de Preceito Fundamental

discussed in the second chapter. Now it should be recalled that in determining that treaties on environmental law are a species of the genre of human rights treaties, the Brazilian Supreme Court recognised the constitutional protection of treaties such as the Paris Agreement, ratified by Brazil in 2016 and passed as a decree in 2017³⁰⁷. There is also a need to bear in mind the constitutional protection of the environment as a fundamental right, and the UN's recognition that it is a human right.

Climate damage can also be understood as residual damage, i.e. a type of damage to the environment³⁰⁸. This type of damage is understood as an injury to a diffuse interest, changing the environmental heritage and potentially impacting personal rights³⁰⁹. Damage to the environment cannot therefore be isolated from damage to human rights. As discussed in the first and second chapters, the changes in the climate caused by global warming intensified by anthropogenic gases are related to several situations of abuse, including worsening conditions for communities and individuals already in a situation of vulnerability.

Some human rights impacts cannot be priced, nor can they be restored to the *status quo ante*. However, this does not mean that the perpetrator should not implement remediation processes. The UNGPs define in their third pillar that when a company finds that it has caused or contributed to impacts on human rights, it must make reparation or contribute to reparation through legitimate processes. These processes can be judicial or non-judicial.³¹⁰

708. Distrito Federal, 2022. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15353796271&ext=.pdf>; Accessed 10 Jan 2024.

³⁰⁷ BRASIL. Decreto n. 9.073, de 5 de junho de 2017: Promulga o Acordo de Paris sob a Convenção-Quadro das Nações Unidas sobre Mudança do Clima, celebrado em Paris, em 12 de dezembro de 2015, e firmado em Nova Iorque, em 22 de abril de 2016. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9073.htm; Accessed 10 Jan 2024.

³⁰⁸ MOREIRA, Danielle de Andrade. CARVALHO E GONÇALVES, Victoria Lourenço. BARBOSA, Fernanda Leite Barbosa. Nota Técnica Sobre Quantificação Da Dimensão Climática do Dano Ambiental. Grupo de Pesquisa Direito, Ambiente e Justiça no Antropoceno (JUMA). PUC-Rio. Julho de 2023. Available at: [danielle-de-andrade-moreira-manifestacao-escrita-audiencia-publica-1.pdf](https://www.cnj.jus.br/danielle-de-andrade-moreira-manifestacao-escrita-audiencia-publica-1.pdf) (cnj.jus.br); Accessed : 10 Jan 2024.

³⁰⁹ LEMOS, Patrícia Faga Iglecias. Mudanças climáticas e responsabilidade civil por dano ao meio ambiente. In: LIVRATTI, Paula; PRESTES, Vanêsa Buzelato (Org.). **Direito e mudanças climáticas** [recurso eletrônico]: responsabilidade civil e mudanças climáticas. São Paulo: Instituto O Direito por um Planeta Verde, 2010.

³¹⁰ UNITED NATIONS (UN). **Guiding Principles on Business and Human Rights**: Implementing the United Nations “Protect, Respect and Remedy” Framework. Available at:

In Brazil, the Civil Code states that there is a duty to make reparation for damage, even if the nature of the damage is exclusively moral³¹¹. So even if a human rights violation cannot be measured financially, the causal agent must structure an appropriate remedy mechanism. When that perpetrator is a business, the application of the Civil Code can be guided by the UNGPs' guidelines for implementing these methods of remedy.

When it comes to climate impacts, one type of damage deserves special attention: inevitable damage that has not yet materialised. The Brazilian legal system provides for urgent injunctions to be granted "(...) when there is evidence of the likelihood of the right and the danger of damage"³¹². Based on this provision, injunctive protection is granted even if the damage has not yet materialised. The procedural aspects of this will not be addressed; the aim is to establish the possibility of future damage. In environmental law, protection against this type of damage is provided by the principles of prevention and precaution, which have already been consolidated in Brazilian legislation, as presented in the second chapter. In such cases, adaptation, discussed earlier in this chapter, would be the way to repair damage that has not yet materialised. Once the limits of the climate damage are set, causality will be discussed.

b) Climate causality

Finally, for civil liability to be recognised, it is necessary to establish the causal link between the unlawful act committed and the damage caused. Given the transnational nature of climate risk, the causal link between GHG emitters and damage related to climate change has proved to be a significant challenge³¹³. The challenge lies in the particularity of the causes and effects of climate change. Although the contribution of companies, states and individuals can be measured, scientific methodologies that can

https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Accessed 10 Jul 2023.

³¹¹ BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm; Accessed 05 Jan 2024.

³¹² BRASIL. Lei n. 10.406, de 10 de janeiro de 2002, institui o Código Civil. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm; Accessed 05 Jan 2024.

³¹³ BRUNNÉE, Jutta. GOLDBERG, Silke. LORD, Richard. RAJAMANI, Lavanya. Overview of legal issues relevant to climate change. In: **Climate change liability**: transnational law and practice / [edited by] Richard Lord ... [et al.]. y Cambridge University Press, New York, 2012.

directly link the place of emission to the place of impact have yet to be identified.

Climate justice, which was discussed in the first chapter, brings this perspective to the unequal distribution of climate risks. The definition of the climate causal link must be based on a new paradigm that meets the needs of the climate emergency. However, this does not mean that there are no legal prerogatives that support this configuration and allow for an interpretation that takes climate change into account.

The causal link is an immaterial element of civil law and can be understood as "the relationship of cause and effect between the agent's conduct and the damage done". It is not a legal concept derived from natural laws based on the cause-and-effect relationship of the perpetrator's conduct³¹⁴. It is not, therefore, a strictly legal concept and can be analysed and built on the knowledge of other sciences, such as physics and philosophy.

Despite being related to subjective liability, intent or fault, the causal link is also necessary in cases of objective liability. However, what is the boundary of this causal link? Different theories³¹⁵ of civil law seek to identify the subjective elements for defining this causal relationship, so as not to make it infinite. The aim of this text is not to extensively analyse all these theories, nor is it to carry out a bibliographical review in search of the state of the art of these discussions. It simply aims to understand how the climate approach would work based on the theories that demonstrate applicability to the climate case.

The Objective Theory of Causality, also known as *conditio sine qua non*, was developed by the German jurist Maximilian von Buri³¹⁶. This theory states that any condition that is necessary for a particular outcome can be considered a cause, regardless of its closeness or importance in contributing to the outcome. The theory suggests that all causal conditions are equivalent, meaning that every result has a combination of multiple

³¹⁴ CAVALIERI FILHO, Sergio. **Programa de responsabilidade civil**. 6. ed. São Paulo: Malheiros, 2005. p. 70.

³¹⁵ CRUZ, Gisela Sampaio da. **O problema do nexo causal na responsabilidade civil**. Rio de Janeiro: Renovar, 2005.

³¹⁶ CRUZ, Gisela Sampaio da. **O problema do nexo causal na responsabilidade civil**. Rio de Janeiro: Renovar, 2005.

causal conditions that contribute to it. However, this theory has faced criticism for being too broad, and when there are multiple causes (concauses), it can be challenging to determine which ones are relevant. In such cases, it is crucial to analyze all the efficient causes that led to the damage.

Despite facing criticisms and challenges in its application, the theory raises an important point in the climate responsibility debate - the existence of causation. Scientific studies³¹⁷ have already established that the responsibility of emissions cannot be attributed to a single actor, whether it be a state or a company. However, the German Constitutional Court rightly pointed out in the Neubauer case that this cannot be used as a justification for actors to shirk their responsibility.

The Theory of Equivalence of Causal Antecedents³¹⁸ emerged in Germany as an alternative to the Objective Theory of Causation. It examines the adequacy of the cause by considering the possibility and probability of the harmful result occurring³¹⁹. This theory recognizes the existence of concauses but seeks to determine which of them would be capable of causing the result in the event of a plurality of concauses. In other words, it's not enough for a fact to be the condition of an event; it must be a condition that normally or regularly causes the same result³²⁰.

In the context of climate change, there is a scientific consensus that GHG emissions (cause) are linked to the causes of climate change, which have an impact on human rights. Studies show that various climatic events are directly related to the rise in global temperatures.³²¹

³¹⁷ Por exemplo, os estudos do IPCC, que remontam à 2007. Fonte: INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2007: Mitigation**. Contribution of Working Group III to the Fourth Assessment. Report of the Intergovernmental Panel on Climate Change, Cambridge, Nueva York, Cambridge university Press, 2007.

³¹⁸ CRUZ, Gisela Sampaio da. **O problema do nexo causal na responsabilidade civil**. Rio de Janeiro: Renovar, 2005.

³¹⁹ CRUZ, Gisela Sampaio da. **O problema do nexo causal na responsabilidade civil**. Rio de Janeiro: Renovar, 2005. p. 65

³²⁰ CRUZ, Gisela Sampaio da. **O problema do nexo causal na responsabilidade civil**. Rio de Janeiro: Renovar, 2005. p. 65

³²¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: **Climate Change 2022: Impacts,**

A third theory, the Theory of Alternative Causality, may also be considered for understanding climate causality. This theory would be problematised whenever we are faced with the actions of two or more individuals that could result in the damage analysed. In this situation "it is not possible to concretely define which of them actually caused the damage"³²². Based on José de Aguiar Dias' analysis³²³, the behaviour of a group would generate the context for the risk to materialise, so the damage would result from collective rather than individual behaviour. The causes of global warming are undoubtedly attributable to more than one state or corporation. The high emission rates of these entities, when combined, result in the climate imbalance that is currently experienced.

Although the three theories present different criteria for establishing causality, they all contain elements that can be used to define the causal link in climate civil liability. Given the unique nature of these transnational relationships, it is essential to define a climate causal link. This link will be further explored in the fourth chapter, where the research will establish a framework based on Brazilian civil law. First, there is a need to examine the legal elements necessary to identify and define this link.

Besides the provisions of Civil Law, other Brazilian regulations establish parameters for shaping this climate causality. While the PNMC³²⁴ does not establish sanctions, it does set out conceptual guidelines that must be considered when applying the law. Article 2 provides important definitions for understanding this climate liability. The PNMC expressly recognises the causality between climate change and human action, considering climate change as "that which can be directly or indirectly attributed to

Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33.

³²² BARBOSA, Mafalda Miranda. Causalidade alternativa incerta e responsabilidade ambiental: uma reflexão a propósito do AC. TRL DE 10-9-2019 (Proc. nº922/15.4T8VFX.L1-7). In: **Revista Quaestio Iuris**, [S. l.], v. 16, n. 2, p. 1145–1172, 2023. Available at: <https://www.e-publicacoes.uerj.br/quaestioiuris/article/view/71918>; Accessed 06 March 2024.

³²³ DIAS, José de Aguiar. **Da responsabilidade civil**. Rio de Janeiro : Lumen Juris, 2012.

³²⁴ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12187.htm; Accessed 10 Jan 2024.

human activity"; having as consequences the changes in the "(...) composition of the global atmosphere", added to the natural climate variability observed over comparable periods. It also defines as a source a "process or activity that releases greenhouse gas, aerosol or greenhouse gas precursor into the atmosphere"³²⁵. Brazilian law has basic conceptual frameworks on elements of climate liability.

Another key point in environmental law is the inversion of the burden of proof. This is clearly stated in Precedent 618 of the STJ, which deals with environmental degradation actions. This shift is essential to balance out the legal relationship between both sides, especially when it comes to establishing liability for companies that have high rates of GHG emissions, and which generally have high economic power³²⁶.

To understand climate causation, one of the challenges is determining the specific relationship between the cause and the damage. It's important to identify which specific emissions or emitters are responsible for causing specific damages. Chapter four will establish a framework for applying the parameters discussed in chapters two and three to explore how Brazilian standards fit into the application of corporate climate responsibility. The characterization of these parameters has already been attempted in other countries and will be analyzed below.

3.3. The new paradigm of climate liability: analysing international cases

As discussed in the previous chapters, the concept of climate accountability has both a preventive aspect, which involves the duty to mitigate, and a reparatory aspect, which applies in the event of actual damage. In cases where negative impacts on human rights occur due to climate change, and considering that companies contribute to such impacts, they need to be held accountable³²⁷. This entails the judicial recognition of companies' climate civil liability. Such accountability can be translated as the duty of

³²⁵ BRASIL. Lei 12.187 de 29 de dezembro de 2009. Institui a Política Nacional sobre Mudança do Clima - PNMC e dá outras providências. Available at: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/12187.htm; Accessed 10 Jan 2024.

³²⁶ SARLET, Ingo Wolfgang. WEDY, Gabriel. FENSTERSEIFER, Tiago. **Curso de Direito Climático**. São Paulo: Thomas Reuters, 2023.

³²⁷ PIRES, Julia Stefanello; PAMPLONA, Danielle Anne. Perspectivas da litigância climática em face de empresas: o caso Milieudefensie et al. vs. Royal Dutch Shell. **Revista de Direito Internacional**, Brasília, v. 19, n. 1, p. 145-163, 2022.

companies to repair or contribute to the repair of human rights impacts related to climate change.

Before discussing the construction of the main cases to be used to analyse this concept, the table below presents a brief overview of climate litigation debating climate liability, which can be used as a paradigm for this establishment. The theoretical framework for the cases selected here is the construction of climate liability, based on the idea of proposing new paradigms in the comprehension of already-established norms³²⁸. The study aims to examine the legal construction used to establish new civil law paradigms to respond to climate emergency demands.

In the following sections, it will be discussing the cases summarised in Table 2, highlighting some of the key arguments put forth by the parties involved. Our aim is to gain a better understanding of the current state of corporate climate liability regulations on an international level, and to apply the insights gained from these discussions to propose a new framework for liability based on Brazilian civil law. Chapter 4 of this study will delve into this proposed framework in more detail.

Table 2 - Leading cases on corporate climate liability

Case	Location	Status	Reasons
<i>Luciano Lliuya v. RWE AG</i> (2015)	Essen Regional Court (Landgericht Essen), Germany	§ 1004 of the Civil Code, German which states: if property is interfered with by means other than removal or retention of possession, the owner may demand that the disturber remove the interference. If there is a fear of further interference, the owner can apply for a prohibition injunction.	On 1 February 2018, the Hamm High Court issued a "Judicial Order" stating that the plaintiff's main claim meets the specificity criteria. The case then proceeded to the evidentiary production phase.
<i>Asmania et al. vs Holcim</i> (2021)	Court of the Canton of Zug (Kantonsgericht), Switzerland	Article 28 of the Swiss Civil Code (violation of personal rights) and Article 41 of the Code of Obligations (compensation for unjust	-

³²⁸ Therefore, cases based on specific regulations on mandatory due diligence that are already in force, such as *Notre Affaire à Tous and Others v. Total* (2021) and *Envol Vert et al. v. Casino* (2021) based on the French Duty of Vigilance Act (LOI n° 2017-399 du 27 mars 2017), will not be analysed. This delimitation was necessary because this type of law establishes a specific legal responsibility for companies in relation to human rights and environmental issues. The approach sought in this research is to explore how it can be typified by the civil and environmental parameters already established in domestic legislation.

		damages).	
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Source: PIREs, Julia Stefanello.

The cases will be examined under the following comparative points: (i) who the plaintiffs and defendants are; (ii) where the litigation was filed; (iii) the competence of the court in which it was filed; (iv) the international norms used in the lawsuits; (v) the concepts and structures used to shape the idea of climate responsibility and/or liability; (vi) the human rights implied; (vii) the theories of justice presented and, in cases where the courts have spoken, (viii) the position of the court within the criteria listed above.

a) Luciano Lliuya v. RWE AG (2015)

In November 2015, Saúl Luciano Lliuya, hereafter referred to only as Lliuya, filed a lawsuit in the German city of Essen before the Essen Regional Court against Rhenish-Westphalian Power Plant (RWE AG). The plaintiff is a Peruvian farmer who owns a house in Huaraz, Peru. The town is located at the foot of the Andes. Between the city and the Andes is Lake Palcacocha³²⁹. It is estimated that as a result of the increase in temperature related to climate change, the glaciers of the Andes are in the process of melting³³⁰. In the lawsuit against RWE, Lliuya explained that melting the glaciers would increase the volume of the lake and flood areas of Huaraz. If ice blocks or rocks under the snow are displaced and fall into the lake, there is a risk of waves that could suddenly hit the city. In the mini documentary "The Climate Case: Peruvian Mountain Guide Saúl Luciano Lliuya vs. German Energy Company RWE", produced by the NGO Germanwatch³³¹, it is possible to see the existence of escape routes in the city, proving that the risk is actual and imminent.

On the opposing side of the dispute, there is a company called RWE AG³³²,

³²⁹ The Cordillera de los Andes is a mountain range in Latin America that stretches across seven countries and plays a crucial role in supplying water to more than 95 million inhabitants. Available at: UNITED NATIONS (UN). UN News: Cordillera dos Andes no Peru.. Available at: <https://news.un.org/pt/gallery/198752>; Accessed 10 Oct 2023.

³³⁰ A. ANCHANTE, A. BUSSALLEU, L. CASTAÑO, A. VALDÉS-VELÁSQUEZ (2012), **El cambio climático en los Andes y la Amazonía**: preguntas frecuentes. Lima, Perú.

³³¹ GERMANWATCH. **The Climate Case**: Peruvian Mountain Guide Saúl Luciano Lliuya vs. German Energy Company RWE. 28 de outubro de 2022. Available at: <https://www.youtube.com/watch?v=FqTd7Bp2Fjc>; Accessed 10 Oct 2023.

³³² According to RWE, its subsidiaries are: RWE Renewables Europe & Australia GmbH, RWE Offshore Wind, RWE Clean Energy, RWE Generation, RWE Power, and RWE Supply & Trading.

which will only be referred to as RWE from now on. This company is involved in the generation, transmission, distribution, and commercialization of electricity and gas, including coal-fired power stations. In the lawsuit, Lliuya has presented data that shows that RWE is responsible for at least 0.45 percent of global emissions and 14.06 percent of German emissions between the years 1751 to 2010³³³. Germany's energy resources rely heavily on coal, lignite, and natural gas³³⁴. RWE's contribution to the global greenhouse gas emission rates was the basis for the company being named as a defendant. The holding company is situated in Essen, Germany, where the lawsuit was filed.

One important aspect of the case at hand is the geographical distance between the locations where the lawsuit was filed and the plaintiff's property, which is alleged to be at risk of flooding. The plaintiff's property, owned by Lilluya, is situated in the municipality of Huaraz in Peru, while the defendant, RWE, has its headquarters and conducts its greenhouse gas emitting activities in Essen, Germany. To establish the connection between the two locations and the legitimacy of the Essen court to hear the case, Lilluya relied on Article 7 of the Rome II Regulation. The regulation stipulates that the victim can base their claim on the law of the country where the event took place that resulted in the damage, under the *lex loci actus principle*³³⁵.

According to Lilluya's reasoning, the company RWE and its subsidiaries have consciously contributed to the anthropogenic greenhouse effect by emitting large amounts of greenhouse gases through the burning of coal and lignite, minerals used for electricity generation. Based on the high contribution rate of RWE to global greenhouse gas emissions, it was argued that the company is disturbing his property, under Article 1.004 of the German Civil Code (BGB), which addresses neighbourhood rights. The German law provides that if the property is interfered with by means other than removal or retention of possession, the owner may demand that the disturber remove the

³³³Data refers only to lignite - a type of rock, meaning the real share would be even higher.

³³⁴ KOCH, Hans-Joachim; LÜHRS, Michael; VERHEYEN, Roda. Germany. In: **Climate change liability** : transnational law and practice / [edited by] Richard Lord ... [et al.]. y Cambridge University Press, New York, 2012.

³³⁵ GERMANWATCH. **The climate case: LLIUYA V. RWE AG**. Climate Case Chart. 2015. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20151123_Case-No.-2-O-28515-Essen-Regional-Court_complaint.pdf; Accessed 10 Oct 2023.

interference. If there is a fear of further interference, the owner may also request an injunction. This disturbance would occur because the emission of greenhouse gases contributes to global warming and, consequently, increases the risk of flooding in Lake Palcacocha and the possibility of destruction of the author's property. Lilluya explains that the rule described in the Civil Code makes no distinction between short and long distances but only states that unreasonable interferences must be avoided to protect properties located in foreign territory.³³⁶

The plaintiff is requesting that the Essen Regional Court declare that the defendant is obligated to pay for the costs of implementing appropriate measures to protect their property against the glacial flooding of Lake Palcacocha. This payment should be in proportion to the defendant's contribution to global greenhouse gas emissions, which corresponds to approximately 0.47%³³⁷. The arguments and requests are based on RWE's mandatory rights and Lilluya's property rights, and do not address aspects of climate justice or human rights impacts.

In 2016, the company RWE denied responsibility for climate damage in the Andes and the potential risk of flooding described by Lilluya. The defence argued that climate change is a global problem and cannot be attributed to any individual or company. Therefore, solutions must be sought at the national and international level.³³⁸

This kind of argument is common in climate litigation cases against companies. However, the existence of such litigation is a result of the state's inability to respond to the urgent need for solutions and failure to address the root causes of climate change. As discussed in the second chapter, the Neubauer et al. v. Germany judgement confirms that no single individual or state can solely solve the problem of climate change.

³³⁶ GERMANWATCH. **The climate case: LLIUYA V. RWE AG.** Climate Case Chart. 2015. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20151123_Case-No.-2-O-28515-Essen-Regional-Court_complaint.pdf; Accessed 10 Oct 2023.

³³⁷ GERMANWATCH. **The climate case: LLIUYA V. RWE AG.** Climate Case Chart. 2015. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20151123_Case-No.-2-O-28515-Essen-Regional-Court_complaint.pdf; Accessed 10 Oct 2023.

³³⁸ GERMANWATCH. **The climate case: LLIUYA V. RWE AG.** Defendant: Written submission (summary). Available at: <https://rwe.climatecase.org/en/material/defendant-written-submission-summary>; Accessed 10 Oct 2023.

However, this does not invalidate the obligation to take action against climate change.³³⁹

In December of the same year, the Essen Regional Court dismissed the case, stating that there was an absence of "legal causality". However, the court did acknowledge a possible "scientific causality". In simpler terms, the court recognized that the defendant's actions could contribute to the consequences of climate change, but this type of causality is not yet covered by any normative provision in force. Therefore, there is an absence of comparable causality. The court also explained the concept of "cumulative causation" and stated that only the interaction of all the emitters could cause the alleged risk of flooding. This type of causation would apply if the risk of flooding disappeared if the defendant's past and future GHG emissions could hypothetically be undone. Even if the defendant's high percentage of GHG emissions was recognized, it would still be insignificant in the historical and global context. After the first instance judgment was dismissed, Lliuya appealed to the Hamm High Court in 2017. The court held a hearing to hear the parties.³⁴⁰

On February 1st, 2018, the Hamm Superior Court issued a "Judicial Order", declaring that the claim of the plaintiff meets the specificity criteria. The Court considered that there is a legitimate interest for the action and argued that it was conceivable that the plaintiff would take appropriate measures to protect their property from flood risks³⁴¹. In May 2022, the Court visited the city of Huaréz, and in August 2023, the expert's report answering the questions of the Superior Court was added to the records.

Although the merits of the case are still being debated, there has been a significant development in specific case law. This development recognizes that private companies might be held responsible for damages associated with climate change in proportion to their contribution to greenhouse gas emissions into the atmosphere. This

³³⁹ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Plattform:** Neubauer, et al. v. Germany. 2020. Available at: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>; Accessed 10 Oct 2023.

³⁴⁰ GERMANWATCH. **The climate case:** LLIUYA V. RWE AG. <https://rwe.climatecase.org/en/legal#beweisaufnahme>; Accessed 10 Oct 2023.

³⁴¹ GERMANWATCH. **The climate case:** LLIUYA V. RWE AG. Climate Case Chart. 2015. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20151123_Case-No.-2-O-28515-Essen-Regional-Court_complaint.pdf; Accessed 10 Oct 2023.

recognition highlights the issue of economic activities responsibility towards the climate crisis.

Climate change has a significant impact on various human rights and fundamentally affects our current way of life. It disproportionately affects the most vulnerable populations. To tackle this problem, we need to adopt a new approach and understanding of the law. Private actors such as civil society and companies must also play a pivotal role in promoting the common good, in addition to state action. Even though climate change is not caused by an individual, company, or country, they must take responsibility for their actions.

Companies cannot be passive subjects, entirely dependent on state regulations to limit their actions. Studies of the Dutch and German courts suggest that companies should identify the risks of their activities and take measures to mitigate them. Despite the many challenges, these cases discuss the position of companies regarding the consequences of business activity.

b) *Asmania et al. vs Holcim (2023)*

This study analysed several legal cases, with the most recent one being filed in 2023 in Zug, Switzerland. In the case of *Asmania et al. v Holcim*, four residents of the Indonesian island of Pari sued Holcim, a Swiss building materials company, in a civil court. The case is based on the Civil Code and relies on Holcim's historical emissions as the basis of the argument. Unlike other cases studied, the court documents for this case are not publicly available. However, given the case's importance in the context of climate change, it is crucial to examine them. The lawsuit was filed by residents of the Indonesian island. The plaintiffs are engaged in fishing and local tourism activities, some of them owning small guesthouses geared towards tourism. Swiss Church Aid HEKS/EPER, the European Centre for Constitutional and Human Rights (ECCHR), and the Indonesian environmental organisation WALHI supported the plaintiffs.

The island is located two hours away from the capital Jakarta by boat, with around 1,500 inhabitants. The local economy is largely dependent on tourism and fishing. Due to its geographic characteristics, Pari island is at risk of having a significant portion of its territory submerged due to rising sea levels. In 2021, the community of Pari

experienced two instances of flooding, with homes and businesses being submerged. In some of the island's beaches, every house was affected³⁴². It is predicted that most of the island will disappear by 2050³⁴³. The floods have had various impacts on the population, including the salinization of clean water wells, loss of personal belongings, housing, and work instruments such as boats, a decrease in income caused by the tourism decline and lost fishing days, among other situations that clearly constitute human rights violations for the island's residents³⁴⁴.

On the other hand, the Swiss company Holcim is one of the largest producers of cement and concrete in the world. The company promotes itself as a "global leader in sustainable construction"³⁴⁵, and is committed to climate goals and targets. As part of its climate action, the company releases an annual report which details its emissions and progress towards established targets. They claim that their mission is to "decarbonize" buildings³⁴⁶.

According to a study by the Climate Accountability Institute, the cement industry is responsible for approximately 8% of global annual emissions, which is almost three times more than the civil aviation sector. Holcim is among the Carbon Majors in this sector. Between 1950 and 2021, the company has generated 7.15 billion tons of CO₂ emissions (scopes 1, 2, and 3), which is equivalent to 0.42% of all global industrial CO₂ emissions since 1750 - more than twice the amount emitted by the entire country of Switzerland during the same period.³⁴⁷

³⁴² MOVIMENTO MUNDIAL PELAS FLORESTAS TROPICAIS. Lutando para não submergir: O povo da Ilha Pari, na Indonésia, contra a injustiça. In: **Boletim WRM 262**. 12 Setembro 2022. Available at: https://www.wrm.org.uy/sites/default/files/bulletin-pdfs/Boletin_262_PT.pdf; Accessed 15 Feb 2024.

³⁴³ MOVIMENTO MUNDIAL PELAS FLORESTAS TROPICAIS. Lutando para não submergir: O povo da Ilha Pari, na Indonésia, contra a injustiça. In: **Boletim WRM 262**. 12 Setembro 2022. Available at: https://www.wrm.org.uy/sites/default/files/bulletin-pdfs/Boletin_262_PT.pdf; Accessed 15 Feb 2024.

³⁴⁴ MOVIMENTO MUNDIAL PELAS FLORESTAS TROPICAIS. Lutando para não submergir: O povo da Ilha Pari, na Indonésia, contra a injustiça. In: **Boletim WRM 262**. 12 Setembro 2022. Available at: https://www.wrm.org.uy/sites/default/files/bulletin-pdfs/Boletin_262_PT.pdf; Accessed 15 Feb 2024.

³⁴⁵ De acordo com informações publicadas pela própria empresa em seu site oficial: <https://www.holcim.com/>; Accessed 10 Feb 2024.

³⁴⁶ HOLCIM. Decarbonizing building: 2022 climate report. 2022. Available at: <https://www.holcim.com/sites/holcim/files/2023-03/31032023-holcim-climate-report-2023-7392605829.pdf>; Accessed 10 Feb 2024.

³⁴⁷ CLIMATE ACCOUNTABILITY INSTITUTE. **Carbon History of Holcim Ltd: Carbon dioxide emissions 1950-2021**. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220707_17478_na.pdf; Accessed 10 Feb 2024.

The lawsuit against the company is based on the fact that they are headquartered in Zug, Switzerland. This is the first major lawsuit relating to climate change filed against a Swiss company. The plaintiffs' legal argument stems from Article 28 of the Swiss Civil Code, which deals with the violation of personal rights, and Article 41 of the Code of Obligations, which pertains to compensation for unfair damages. In terms of Holcim's historical emissions, which are the causal factor, the lawsuit relies on consolidated data from a study conducted by Richard Heede/Climate Accountability Institute.

The plaintiffs are demanding fair compensation for the climate damage they have suffered. They also want Holcim to contribute financially towards flood protection measures. In addition, the plaintiffs request Holcim to reduce its CO₂ emissions by 43% by 2030 and 69% by 2040, compared to the company's emissions in 2019. These targets are in line with the Paris Agreement.

The case is recent: it was filed in 2023, so the documents have not yet been made public and the court has not yet made a decision. This makes it difficult to analyse the case and draw conclusions. Nevertheless, the proposal, which is unprecedented in Swiss courts, is noteworthy due to its implications for civil liability against companies. Even if it is eventually found to be unfounded, similar cases will contribute to elevating the debate on this topic and shaping the concepts and norms required for effective climate action.

One key lesson that can be learned from previous cases is the importance of courts issuing judgments. For example, the case of Neubauer et al. v. Germany³⁴⁸, and the Urgenda Foundation v. State of the Netherlands³⁴⁹ have made significant progress in establishing principles and legal bases that can be used in similar cases. Drawing on the limits outlined in the second and third chapters of this study, the fourth chapter will

³⁴⁸ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** Neubauer, et al. v. Germany. 2020. Available at: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>; Accessed 01 Feb 2024.

³⁴⁹ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** Urgenda Foundation v. State of the Netherlands . Duty of care under Articles 2 and 8 ECHR. Reduction greenhouse gas emissions. Available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf; Accessed 10 May 2021.

analyze the applicability of these principles to Brazilian law.

CHAPTER 4. CLIMATE LITIGATION IN BRAZIL AND THE BUSINESS ACTIVITY

“(…) climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”

(Preamble, Paris Agreement)

The question of whether businesses should be held accountable for climate change is currently at the centre of discussion. This is evident as climate litigation cases increase. In the second and third chapters, the regulatory tools that deal with the concepts of responsibility and liability were discussed, as well as the preventative and remedial aspects of climate liability. We also highlighted how these concepts have been utilized in climate litigation in other countries. The fourth chapter delves into the practical application of these concepts.

Climate litigation is gaining ground in Brazil, yet there is still room for improvement in addressing the issue³⁵⁰. The urgency of progress cannot be overstated, as Brazil is one of the world's largest emitters of greenhouse gases³⁵¹, responsible for 3%³⁵² of the global total and ranking first among Latin American countries. Over the past three

³⁵⁰ As in the ADPF decision number 708, in 2022, recognising that treaties on environmental law are a species of the genre of human rights treaties. Thus granting constitutional protection to the Paris Agreement.

³⁵¹ In this ranking, Brazil is behind China (25.2 per cent), the US (12 per cent), India (7 per cent), the European Union (6.6 per cent), Russia (4.1 per cent) and Indonesia (4 per cent). Source: POTENZA, Renata Fragoso. QUINTANA, Gabriel de Oliveira. CARDOSO, Anderson Matheus (Imaflora); TSAI, David Shiling. CREMER, Marcelo dos Santos. SILVA, Felipe Barcellos e. GRACES, Ingrid (Iema); CARVALHO, Kaccnny. COLUNA, Iris (ICLEI); SHIMBO, Julia. SILVA, Camila. SOUZA, Edriano. ZIMBRES, Bárbara. ALENCAR, Ane (Ipam); ANGELO, Claudio. AZEVEDO, Tasso (Observatório do Clima). **Análise das emissões de gases de efeito estufa e suas implicações para as metas climáticas do Brasil / 1970-2021**. Observatório do Clima, 2023. Available at: <https://energiaeambiente.org.br/wp-content/uploads/2023/04/SEEG-10-anos-v5.pdf>; Accessed 20 Feb 2024.

³⁵² POTENZA, Renata Fragoso. QUINTANA, Gabriel de Oliveira. CARDOSO, Anderson Matheus (Imaflora); TSAI, David Shiling. CREMER, Marcelo dos Santos. SILVA, Felipe Barcellos e. GRACES, Ingrid (Iema); CARVALHO, Kaccnny. COLUNA, Iris (ICLEI); SHIMBO, Julia. SILVA, Camila. SOUZA, Edriano. ZIMBRES, Bárbara. ALENCAR, Ane (Ipam); ANGELO, Claudio. AZEVEDO, Tasso (Observatório do Clima). **Análise das emissões de gases de efeito estufa e suas implicações para as metas climáticas do Brasil / 1970-2021**. Observatório do Clima, 2023. Available at: <https://energiaeambiente.org.br/wp-content/uploads/2023/04/SEEG-10-anos-v5.pdf>; Accessed 20 Feb 2024.

decades, emissions caused by Land and Forest Use Change³⁵³ have remained the primary source of emissions in the country. Within economic activities³⁵⁴, the agricultural sector accounts for 60 to 80 per cent of the country's emissions each year. In recent years, Brazil has seen an increase in net emissions, which represents a failure to meet climate targets. Business activities bear a share of responsibility for these emissions, and thus must be held accountable.

In 2021, the Energy and Industrial Processes (PIUP) sectors were responsible for 22% of Brazil's emissions. This year's data reveals a concerning situation, as energy emissions were the highest since 2015, and PIUP emissions were the highest recorded in the historical series from 1970 to 2021³⁵⁵. It's important to note that the agricultural sector, which was mentioned earlier, also contributes to GHG emissions. This data highlights the significant role that companies play in causing emissions in Brazil. Despite having 18 laws and 42 policies related to climate and climate change³⁵⁶, there are still gaps in the government's efforts towards effective climate action. One of these gaps is the lack of connection between business activities and climate goals. Climate litigation has been taking steps to address these gaps, albeit slowly.

The Climate Litigation Platform in Brazil, part of the Law, Environment and Justice in the Anthropocene Research Group (JUMA) at the Pontifical Catholic

³⁵³ " The Land Use Change and Forestry sector reports gross and net GHG emissions related to the processes of changes in the stocks of biomass and organic matter existing above and below ground, as well as emissions from the combustion of forest waste." Translated by the author from: INSTITUTO DE PESQUISA AMBIENTAL DA AMAZÔNIA (IPAM). **Nota Metodológica SEEG 8 Setor Mudança de Uso da Terra e Florestas**. 2020. Available at: https://seeg-br.s3.amazonaws.com/2019-v7.0/notas-metodologicas/SEEG8_NOTA_METODOLOGICA_MUT_2020.11.03.pdf; Accessed 20 Feb de 2024.

³⁵⁴ Considerando Agropecuária; Transporte; Energia; Comercial, Residencial e Setor Público, e Indústria.

³⁵⁵ In this ranking, Brazil is behind China (25.2 per cent), the US (12 per cent), India (7 per cent), the European Union (6.6 per cent), Russia (4.1 per cent) and Indonesia (4 per cent). Source: POTENZA, Renata Fragoso. QUINTANA, Gabriel de Oliveira. CARDOSO, Anderson Matheus (Imaflora); TSAI, David Shiling. CREMER, Marcelo dos Santos. SILVA, Felipe Barcellos e. GRACES, Ingrid (Iema); CARVALHO, Kaccnny. COLUNA, Iris (ICLEI); SHIMBO, Julia. SILVA, Camila. SOUZA, Edriano. ZIMBRES, Bárbara. ALENCAR, Ane (Ipam); ANGELO, Claudio. AZEVEDO, Tasso (Observatório do Clima). **Análise das emissões de gases de efeito estufa e suas implicações para as metas climáticas do Brasil / 1970-2021**. Observatório do Clima, 2023. Available at: <https://energiaeambiente.org.br/wp-content/uploads/2023/04/SEEG-10-anos-v5.pdf>; Accessed 20 Feb 2024.

³⁵⁶ GRANTHAM RESEARCH INSTITUTE. SABIN CENTER AT COLUMBIA LAW SCHOOL. **Climate Change Laws of the World Platform**: Brazil. Available at: <https://climate-laws.org/geographies/brazil/>; Accessed 20 Feb 2024.

University of Rio de Janeiro (PUC-RJ)³⁵⁷, reported that as of January 2024, there were only 31 lawsuits in Brazil involving companies as defendants³⁵⁸. Five of these cases involved state entities: with three against a public service concessionaire³⁵⁹, one against individuals occupying a public space illegally³⁶⁰, and one against a company and federative entity due to problems in the Environmental Impact Study for project implementation³⁶¹. The company was removed from the defence in the last case. Therefore, the research will consider the arguments presented in 26 climate disputes brought against companies in Brazil.

This chapter consists of four parts. Firstly, we will provide an overview of the discourse in climate litigation against companies in Brazil based on the data collected by the Climate Litigation Platform in Brazil of the JUMA Group at PUC-RJ³⁶². Secondly, it will examine the critical Brazilian cases to determine the responsibility and liability of companies. Thirdly, we will analyse the ongoing cases which point towards the characterization and application of corporate climate responsibility. Finally, it will extract these elements from the existing instances. It's worth noting that there are no cases in Brazil seeking redress for human rights impacts along the lines mentioned above.

Our aim is to propose a framework for implementing the conclusions on how to configure corporate responsibility for mitigating the causes of climate change and liability for damages in cases of human rights violations due to it. This will be based on the frameworks of Brazilian legislation discussed in chapters two and three and considering the theory of climate justice presented in the chapter. Our proposal will consider how these factors contribute to the causes of global warming.

4.1. Climate litigation discourse against companies in Brazil: advances and questions

³⁵⁷The Climate Litigation Platform in Brazil can be accessed on the website: <https://www.juma.nima.puc-rio.br/base-dados-litigancia-climatica-no-brasil>.

³⁵⁸ Data updated to February 2024.

³⁵⁹ ONG Costa Legal e outros vs. Município de Florianópolis e outros; Instituto Preservar, AGAPAN e Núcleo Amigos da Terra vs. União Federal e outros; Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda.

³⁶⁰ Ministério Público Federal vs. União Federal e outros.

³⁶¹ Duda Salabert Rosa vs. estado de Minas Gerais e Taquaril Mineração S.A.

³⁶² The Climate Litigation Platform in Brazil can be accessed on the website: <https://www.juma.nima.puc-rio.br/base-dados-litigancia-climatica-no-brasil>.

Brazil is located in Latin America, which is a part of the Global South. The term "Global South" refers to a relationship of space and power rather than a physical location. This concept replaces outdated and stereotypical terms like "third world" or "underdeveloped countries"³⁶³. It is important to understand this geographical and socio-economic context to comprehend climate disputes in the area. It's crucial to appreciate the complexity of the knowledge that comes from the Global South and consider the specificities of different cultures that form this space. For instance, Latin America has been influential in advancing discussions and measures to safeguard human rights. The region played a vital role in defining and developing business and human rights, even when this terminology didn't address the issue.³⁶⁴

Thompson³⁶⁵ suggests a paradigm shift in human rights concerns. Violations that once seemed to be independent of state due diligence can now be enforced in court. This is what has been happening with human rights impacts related to climate change.

Climate litigation is on the rise in the Global South, even though it represents a small percentage of cases worldwide. The cases from this region generally focus on the enforcement of existing norms rather than proposing or challenging new legislation and policies³⁶⁶. Latin America, in particular, has been a leader in using the United Nations Guiding Principles on Business and Human Rights (UNGPs) as interpretive standards for applying national or international legal norms in litigation³⁶⁷. This study specifically examines the legal production in Brazil. According to the 2023 Global Climate Litigation

³⁶³ BINAGHI, Emilio. Algunos problemas con la noción de Sur Global. In: **Das Questões**, [S. l.], v. 8, n. 1, p. 107–112, 2020. Available at: <https://periodicos.unb.br/index.php/dasquestoes/article/view/31100>. Accessed 03 March 2024.

³⁶⁴ CANTÚ RIVERA, Humberto. PAMPLONA, Danielle Anne. THOENE, Ulf. Business and Human Rights in Latin America: An Introduction to the Special Issue. In: **Business and Human Rights Journal** 7(3): 335–41, 2022.

³⁶⁵ THOMPSON, José. Le evolución de los sujetos de obligaciones del derecho internacional de derechos humanos: del Estado al sector privado. In: **Instituto Interamericano de Derechos Humanos Derechos Humanos y Empresas: Reflexiones desde América Latina** / Instituto Interamericano de derechos humanos. -- San José, C.R. : IIDH, 2017. P. 162

³⁶⁶ PEEL, Jacqueline; LIN, Jolene. "Transnational Climate Litigation: The Contribution of the Global South." **American Journal of International Law** 113, no. 4 (2019): 679–726. <https://doi.org/10.1017/ajil.2019.48>.

³⁶⁷ CANTÚ RIVERA, Humberto. PAMPLONA, Danielle Anne. THOENE, Ulf. Business and Human Rights in Latin America: An Introduction to the Special Issue. 2022. **Business and Human Rights Journal** 7(3): 335–41.

Report³⁶⁸, Brazil ranks fifth among the top ten jurisdictions with the highest accumulated cases³⁶⁹. However, the potential of climate litigation in Brazil has not yet been fully explored. The country's Supreme Court only received its first climate litigation case in 2020 with the receipt of the ADPF case number 708, which discussed the government's management of the Climate Fund. Before delving into the significant climate litigation cases in Brazil and their approach to concepts, it is essential to understand the history and means of such litigation.

Gabriel Wedy emphasizes the importance of considering a legal and juridical doctrine while dealing with climate disputes, as the issue is usually addressed only from an environmentalist perspective. In his book, "Climate Disputes", the author examines the actions provided for in the Brazilian legal system that could be used as procedural tools for climate disputes³⁷⁰. Although the book is focused on analyzing the procedures, the author points out that as the recipient of a balanced environment is the entire community, the interests threatened or violated in the case of impacts related to climate change would be diffuse. Therefore, a claim for "(...) environmental moral damage would be applicable in a public civil action, based on Article 1 of the LACP, due to extreme climatic events or catastrophes resulting from them"³⁷¹, which would characterise this damage as objective extra-patrimonial damage.

The author Wendy has identified five types of climate-related legal cases that are expected to emerge in the next few years. One of them is the approach of attributing responsibility to individuals and companies for climate change caused by human activities³⁷². The author points out that as science advances and the definitions and concepts related to climate change become more established, the arguments and

³⁶⁸ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP). **Global Climate Litigation Report: 2023** Status Review. 2023. Nairobi. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3; Accessed 05 Dec 2023.

³⁶⁹ Excluindo os Estados Unidos da América e a União Europeia.

³⁷⁰ WEDY, Gabriel. **Litígios Climáticos**: de acordo com o Direito brasileiro, norte-americano e alemão. Salvador: editora JusPodium, 2019.

³⁷¹ WEDY, Gabriel. **Litígios Climáticos**: de acordo com o Direito brasileiro, norte-americano e alemão. Salvador: editora JusPodium, 2019. p. 82.

³⁷² WEDY, Gabriel. As novas tendências dos litígios climáticos (The New Trends in Climate Litigation). SSRN, August 2, 2021. Available at: <https://ssrn.com/abstract=3898054>; Accessed 20 Feb 2024.

foundations for litigants and courts in climate cases will become stronger.

Initially, in Brazil, the issue of climate change was not given much importance and was often only discussed as a part of broader environmental issues. However, in recent years, there has been a significant rise in climate litigation cases in the country. As per the Climate Litigation Platform in Brazil, operated by the PUC-RJ JUMA Group³⁷³, there are currently 80 climate litigation cases in Brazil, with more than 90% of them being filed after 2017. Out of the six oldest cases, filed between 1996 and 2014, only two cases focus on climate change as the central issue while the others only mention climate impacts in passing. However, more than half of the cases filed after 2017 have the issue of climate change as one of the central themes.

It has been observed that a considerable number of legal cases do not explicitly address the climate issue, but instead deal with it indirectly. This kind of legal action is known as "Stealthy" Climate Litigation, as classified by Peel and Lin³⁷⁴. The authors explain that this approach involves diluting the climate issue within other, less controversial arguments. This strategy is becoming increasingly popular in the Global South, where it is believed to have a greater chance of success in court.

Climate litigation is a relatively new phenomenon in Brazil, especially when considering cases where climate issues are the primary focus. Often, climate issues arise tangentially in the course of other legal actions. However, there are important lessons to be learned from cases in progress or already judged in the country, even if climate issues have not been the central element of the action. In Brazil, climate litigation has focused primarily on the responsibility of the state to enforce or regulate climate laws³⁷⁵. Cases against companies are still developing. Many of these disputes are based on the requirements of the Environmental Impact Assessment (EIA), a requirement of the National Environmental Policy Act (PNMA) regulated by Brazilian environmental

³⁷³The Climate Litigation Platform in Brazil can be accessed on the website: <https://www.juma.nima.puc-rio.br/base-dados-litigancia-climatica-no-brasil>.

³⁷⁴ PEEL, Jacqueline; LIN, Jolene. "Transnational Climate Litigation: The Contribution of the Global South." *American Journal of International Law* 113, no. 4 (2019): 679–726.

³⁷⁵ PAMPLONA, Danielle Anne. PIRES, Julia Stefanello. Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil. *Connecticut Law Review*. 2023, n. 574. Available at: https://digitalcommons.lib.uconn.edu/law_review/574/; Accessed 16 Feb 2024.

authorities since CONAMA Resolution 001 of 23/01/1986. However, applying companies' civil obligations based on climate risks and impacts is still relatively uncommon.

As part of this study, the important concepts and argumentative structures that define corporate climate responsibility and accountability will now be analysed. The first point to consider in relation to argumentation is the use of environmental or climate justice concepts in constructing legal cases. Out of all the lawsuits filed against companies³⁷⁶, only eleven of them make use of such arguments. Of these, eight cases presented by IBAMA³⁷⁷ contain an approach to environmental justice. The argumentative structure is based on a study by Marcelo Kokke³⁷⁸, who argues that seeking responsibility for environmental restoration is necessary to correct distortions and ensure environmental justice by addressing intergenerational inequality and risk. These cases will be discussed in greater detail later on.

There is a lack of cases in Brazilian courts that address climate issues from the perspective of environmental or climate justice³⁷⁹. Only one case, *AGAPAN and Others vs. IBAMA and Others* (2021), uses Henry Acselrad's³⁸⁰ theoretical framework to develop the concept of environmental justice comprehensively. This lawsuit deals with climate risks and the structural pillars of ecological justice, including access to information and participation. However, no case specifically addresses issues of climate justice. It is crucial to address this type of theory to characterize the unequal distribution

³⁷⁶Which are being considered in this work, according to the abovementioned delimitation.

³⁷⁷Cases filed by IBAMA: *IBAMA vs. Madeira Nova Aliança* (1000275-31.2019.4.01.3902); *IBAMA vs. V. de Souza Brilhante EIRELI* (1003478-16.2018.4.01.3100); *IBAMA vs. Madeireira Madevi* (1000656-73.2018.4.01.3902); *IBAMA vs. Madelin Madeireira Linhares LTDA* (1001659-42.2018.4.01.4200); *IBAMA vs. Indústria, Comércio, Importação e Exportação de Madeiras Floresta Verde Ltda.* (1000083-80.2019.4.01.3908); *IBAMA vs. Seringal Indústria e Comércio de Madeiras EIRELI* (1000364-26.2019.4.01.3200); *IBAMA vs. Gabriel Indústria e Comércio Madeiras EIRELI* (1000185-42.2018.4.01.3907); *IBAMA vs. Alto Norte Indústria, Comércio e Exportação de Madeiras Ltda.* (1000200-41.2018.4.01.3606).

³⁷⁸KOKKE, Marcelo. **Conflitos intergeracionais**: uma matriz para análise dos confrontos socioambientais, culturais e jurídicos. Rio de Janeiro: Lumen Juris, 2018.

³⁷⁹Caso *IBAMA vs. Siderúrgica São Luiz Ltda., Geraldo Magela Martins e GMM Participações Societárias Ltda.* (2019)

³⁸⁰From the work: ACSELRAD, Henry. *Justiça ambiental – ação coletiva e estratégias argumentativas*. In: ACSELRAD, Henry. HERCULANO, Selene. PADÚA, José Augusto. (Org.) **Justiça ambiental e cidadania**. Rio de Janeiro: Relume Dumará, 2004.

of risks, as discussed in the first chapter. Therefore, there is still a gap in defining and establishing an understanding of climate justice in Brazilian courts.

Brazil is making progress in its legal discussions on climate protection, as evidenced by the increase in environmental debates in higher courts. One example of this progress is the "Green Agenda" ruling, which began in March 2022 at the STF. This ruling consolidated seven lawsuits related to environmental issues, including some that addressed climate disputes. Deforestation, which is one of the primary sources of greenhouse gas emissions in Brazil, was one of the main topics in most of these lawsuits. The majority of the cases were concluded between 2022 and 2023, but a few are still pending. The trials for the remaining two lawsuits will resume in March 2024³⁸¹. While these cases are not strictly climate litigation, the fact that they are being debated in higher courts is significant. The concepts and definitions established in these actions can and should be used as a basis for judgments on specific climate issues, such as their impact on human rights.

The study's second and third chapters examined emblematic cases from around the world, including rulings from Germany and the Netherlands. One of the conclusions drawn was that many advancements have been made due to symbolic decisions by higher courts. For example, in Germany, the Neubauer et al. v. Germany³⁸² case and in the Netherlands, the Urgenda Foundation v. State of the Netherlands³⁸³ case set legal standards that allowed the debate to advance in climate litigation filed later. In 2022, the recognition of environmental treaties as a human rights treaty in the ADPF 708³⁸⁴ decision represented a significant legal milestone in the Brazilian context.

³⁸¹ Arguição de Descumprimento de Preceito Fundamental (ADPF) 760 and Ação Direta de Inconstitucionalidade por Omissão (ADO) 54. According to the list of cases on the agenda: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=528317&ori=1>; Accessed 01 Feb 2024.

³⁸² SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** Neubauer, et al. v. Germany. 2020. Available at: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>; Accessed 01 Feb 2024.

³⁸³ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** Urgenda Foundation v. State of the Netherlands. Duty of care under Articles 2 and 8 ECHR. Reduction greenhouse gas emissions. Available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf; Accessed 10 May 2021.

³⁸⁴ SUPREMO TRIBUNAL FEDERAL (STF). Arguição de Descumprimento de Preceito Fundamental 708. Distrito Federal, 2022. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15353796271&ext=.pdf>; Accessed 10 Jan 2024.

The STF has granted constitutional protection to treaties, including the Paris Agreement, which Brazil ratified in 2016 and enacted as a decree in 2017³⁸⁵. This means that the commitments, objectives, and principles outlined in the Paris Agreement are constitutionally protected and enforceable in Brazil's legal system. This protection should not only influence the application of the law but also the interpretation of the normative set and Brazilian legal protection for safeguarding the rights of those affected by climate change.

Regarding the ongoing cases against the companies mentioned earlier, they are still in progress. Although some have received preliminary or first-instance rulings, a final decision has not yet been made. The significant cases that address various aspects of climate responsibility will be examined in the following sections.

4.2. The new paradigm of corporate climate responsibility: analysing Brazilian cases

Of all the cases brought before the Brazilian courts, only a few address the debate on the preventive aspect of corporate climate responsibility, i.e. the duty to mitigate their contribution to the causes of global warming. Generally, this approach is presented in questioning an adequate EIA. The EIA, together with the RIMA, is a requirement of the PNMA. They became a requirement of Brazilian environmental bodies following CONAMA Resolution 001 of 23/01/1986. The EIA must analyse:

(...) the environmental impacts of the project and its alternatives by identifying, predicting the magnitude and interpreting the importance of the likely relevant impacts, breaking down the positive and negative impacts (beneficial and adverse), direct and indirect, immediate and in the medium and long term, temporary and permanent; their degree of reversibility; their cumulative and synergistic properties; the distribution of social burdens and benefits.³⁸⁶

The issue of responsibility in Brazilian climate litigation is not limited to companies alone, but also extends to the bodies responsible for conducting and approving studies at the municipal, state, or federal level through the Brazilian Institute for the

³⁸⁵BRASIL. Decreto n. 9.073, de 5 de junho de 2017: Promulga o Acordo de Paris sob a Convenção-Quadro das Nações Unidas sobre Mudança do Clima, celebrado em Paris, em 12 de dezembro de 2015, e firmado em Nova Iorque, em 22 de abril de 2016. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9073.htm; Accessed: 10 Jan 2024.

³⁸⁶ Translated by the author from: CONSELHO NACIONAL DO MEIO AMBIENTE (CONAMA). Resolução n° 001 de 23/01/1986. Available at: <https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-230186.PDF>; Accessed 16 Feb 2024.

Environment and Renewable Natural Resources (IBAMA). These studies have been criticized for their incomplete and inaccurate analyses, as they often ignore socio-environmental damage and climate risks. To better understand and explore corporate climate responsibility, this study will analyse a representative case and draw out questions, concepts, and applications.

In the following section, the case summarised in Box 3 will be analysed in greater detail. Emblematic elements from the arguments, defence, and decision (if any) will be extracted to understand the development of corporate climate responsibility on the international stage. These lessons learned will be used to propose a framework for a new paradigm based on the norms of Brazilian civil law. This proposed framework will be presented in the last topic of the Chapter 4.

Table 3 - Leading cases of corporate climate responsibility in Brazil

Case	Location	Status	Reasons	Court decision
<i>Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda.</i> (5020957-93.2022.4.02.5101) (2022)	Federal Regional Court of the 2nd Region, Judicial Section of Rio de Janeiro	The case was dismissed without resolution of the merits at first instance. The Federal Public Prosecutor's Office (MPF) has filed an appeal with a request for urgent injunctive relief, challenging the decision to dismiss the case. The appeal has not yet been judged.	A Public Civil Action (ACP) was filed due to alleged irregularities in the Environmental Licensing process for 36 temporary power transmission line towers in Sepetiba Bay, in Itaguaí, Rio de Janeiro. Main rules used: Art. 225 of the 1988 Constitution of the Federative Republic of Brazil (CRFB/88) National Environmental Policy - PNMA (Federal Law 6.938/1981) Paris Agreement (Federal Decree 9.073/2017) United Nations Framework Convention on Climate Change - UNFCCC (Federal Decree 2.652/1998) CONAMA Resolution 1/1986 CONAMA Resolution 237/1997 Atlantic Forest Law (Federal Law 11.428/2006)	At first level, the case was dismissed without a decision on the merits, on the grounds of: (i) the MPF's active illegitimacy; (ii) the court's absolute incompetence; and (iii) a lack of interest in acting due to the inappropriateness of the chosen course of action. It was held that the lawsuit filed by the MPF would be the responsibility of the Attorney General of the Republic, with the Federal Supreme Court having original jurisdiction.

Source: PIRES, Julia Stefanello.

The cases will be examined under the following comparative points: (i) who the plaintiffs and defendants are; (ii) where the litigation was filed; (iii) the competence of the court in which it was filed; (iv) the international norms used in the lawsuits; (v) the concepts and structures used to shape the idea of climate responsibility and/or liability; (vi) the human rights implied; (vii) the theories of justice presented and, in cases where the courts have spoken, (viii) the position of the court within the criteria listed above.

a) *Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda. (2022)*

The Federal Public Prosecutor's Office (Ministério Público Federal, MPF) has filed a lawsuit against the State Environmental Institute (Instituto Estadual do Ambiente, INEA) and Karpowership Brasil Energia Ltda, the company responsible for building floating power plants, also known as Powership³⁸⁷. The lawsuit is in response to alleged irregularities in the environmental licensing process for 36 temporary power transmission line towers in Sepetiba Bay, Itaguaí, Rio de Janeiro. The MPF aims to prevent the installation of thermoelectric power plants in the area due to studies showing that Karpowership's facilities would impact Sepetiba Bay. As this territorial sea falls under the jurisdiction of the Federal Government (according to Article 20, VI of the Federal Constitution), the case was brought before the Federal Court.

The case being discussed doesn't deal with human rights protection or theories of climate and environmental justice. It does mention international standards that guide the PNMC, such as Brazil's commitments in the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and other climate change documents that it may sign. The case understands that state action should be guided by Brazil's goals in climate agreements, including the Paris Agreement. In this litigation, the author argues that the environment is a public good and should be protected by the PNMC. He believes that the environment's physical, biotic, and socio-cultural aspects should be considered. Economic activities should therefore be limited by the rules in the Constitution of the

³⁸⁷ According to information provided by the company on its official website: <https://karpowershipbrasil.com.br/>; Accessed 02 March 2024.

Republic that balance economic development with ecosystem preservation. Article 170 of the Federal Constitution states that economic activity should prioritize the defence of the environment. This includes differentiated treatment based on the environmental impact of products and services and their production and provision processes.³⁸⁸

It is widely accepted in legislation, doctrine, and case law that companies are responsible for protecting the environment. This means that "(...) adequate, proportionate and efficient action must be taken to preserve, conserve and restore environmental heritage"³⁸⁹. The principle of prevention necessitates that companies adopt the best available technique to compensate for potential environmental damage. However, the author argues that the Environmental Impact Assessment (EIA) falls short in terms of considering these principles and seeking the best environmental protection. To address this, the author suggests that the EIA be complemented to ensure that the best environmental protection measures are put in place. A gap that has been identified relates to climate change, and one of the requirements demands that the EIA be complemented in such a way as to:

assess how the project contributes to climate change, how it fits into efforts to meet climate targets, whether it is absolutely necessary and, if so, what measures are possible to ensure that emissions are mitigated as much as possible³⁹⁰.

The plaintiff has provided reasons which state that the state's climate commitments do not prohibit the establishment and functioning of projects that emit greenhouse gases. Nevertheless, these commitments impose at least one burden, which is to extensively justify the preference for the fossil fuel model. To validate this justification,

³⁸⁸ BRASIL. Constituição da República Federativa do Brasil de 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; Accessed 05 Jan 2024.

³⁸⁹ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda. Petição inicial. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2F9JLjBrKtCccuuLemSDgN%2F01_Peti%C3%A7%C3%A3oInicial_MPFvs_INEAeKarpowership.pdf?alt=media&token=80074192-14c8-4c91-938d-a7c574fb495b; Accessed 26 Feb 2024.

³⁹⁰ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda. Petição inicial. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2F9JLjBrKtCccuuLemSDgN%2F01_Peti%C3%A7%C3%A3oInicial_MPFvs_INEAeKarpowership.pdf?alt=media&token=80074192-14c8-4c91-938d-a7c574fb495b; Accessed 26 Feb 2024.

the environmental studies must be comprehensive, and they should consider technical alternatives to this energy production model. However, in this case, such a demonstration has not been presented.

Although the case did not address the UNGP guidelines, it is important to highlight the active listening and participation of rights-holders. In line with the UNGPs, in their human rights risk management companies must prioritize the impact on people, rather than the impact on the enterprise³⁹¹. To fulfil their responsibility to respect human rights, companies must establish risk management processes that include the perspective of those who may be affected. In Brazil, one of the steps in the EIA involves holding public hearings with the communities in the project's area of influence. During these hearings, the voices of the affected communities must be heard to allow for their actual participation in the decision-making process. In the case against INEA and Karpowership, legal requirements were not adequately addressed, as there was no public hearing. The MPF even presented a letter from the Sepetiba Beach Fishermen's Colony, expressing their concern and discomfort with the project³⁹².

In November 2022, the case was dismissed by the court of first instance without a decision on the merits. The reason for dismissal was due to the MPF's active illegitimacy (lack of attribution), the court's absolute incompetence (lack of a procedural prerequisite), and the inadequacy of the chosen course of action³⁹³. The grounds for the action were not addressed as the case was dismissed without judgment. The MPF has

³⁹¹ UNITED NATIONS (UN). Working Group on the issue of human rights and transnational corporations and other business enterprises. **Information Note on Climate Change and the Guiding Principles on Business and Human Rights**. Junho de 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>; Accessed 15 Jan 2024.

³⁹² DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda. Ofício da Colônia de Pescadores. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2F9JLjBrKtCccuuLemSDgN%2F02_Peti%C3%A7%C3%A3o_JuntadaPescadores_MPFvsINEAeKarpowership.pdf?alt=media&token=555d8109-0ba7-4db6-a2df-cc1b8795b632; Accessed 26 Feb 2024.

³⁹³ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público Federal vs. INEA e Karpowership Brasil Energia Ltda. Sentença de primeiro grau. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2F9JLjBrKtCccuuLemSDgN%2F04_Decis%C3%A3o_Senten%C3%A7a_MPFvsINEAeKarpowership.pdf?alt=media&token=542a100e-babf-4f9a-b7b1-e812eb214f4c; Accessed 26 Feb 2024.

filed an appeal challenging the decision to discontinue the action and requesting urgent appellate relief. However, the appeal is still pending judgment.

4.3. The new paradigm of corporate climate liability: analysing Brazilian cases

The use of climate civil liability has been attempted in Brazilian litigation before, particularly in cases against airlines back in 2010. Although unsuccessful at the time, after more than a decade the gaps in this framework are still being discussed. However, during this period, many legislative advances have supported questions and advancements in the legal debate. To gain a comprehensive understanding of this new paradigm, it is crucial to analyse the positions of the courts and examine the proposals being put forward in the country.

In the following section, it will examine the cases summarised in Table 4 in more detail. The study seeks to identify the key arguments made by the parties and any court rulings (if applicable). Our goal is to gain a better understanding of how corporate climate responsibility is being established on the international stage. The insights gained from this analysis to propose a new framework based on the norms of Brazilian civil law will be used. This framework will be developed further in Chapter 4 of this study.

Table 4 - Leading cases on corporate climate liability in Brazil

Case	Location	Status	Reasons	Court decision
<i>Ministério Público do Estado de São Paulo vs. KLM (0082072-08.2010.8.26.0224 e 0046991-68.2012.4.03.9999) (2010)</i>	The case was filed in the State of São Paulo Court of Justice, in the district of Guarulhos, but was later assigned to the Federal Regional Court of the 3rd Region, Judicial Section of São Paulo.	The case reached the Superior Court of Justice (STJ), which also dismissed the case. Public Civil Action (ACP) for alleged environmental damage resulting from commercial activities carried out by the defendant at São Paulo International Airport, in Cumbica, Guarulhos, through the landing and take-off of its aircraft.	Main norms used: Art. 225 of the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88) Art. 170 of the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88) Art. 196 of the 1988 Constitution of the Federative Republic of Brazil (CRFB/88) National Environmental Policy - PNMA (Federal Law 6.938/1981) National Policy on Climate Change - PNMC (Federal Law 12.187/2009)	In the Special Appeal (REsp 1.856.031/SP) the STJ followed the position of the court of origin, in the sense of emphasising the specific regulation of the activity by ANAC and its efforts with regard to the measurement and mitigation of emissions by the airline industry. It was held that there was no need to speak of a wrongful act committed by the company (or even pollution), since the MPSP was seeking to impose an unforeseen regulation.

<i>IBAMA vs. Madeira Nova Aliança</i> (1000275-31.2019.4.01.3902) (2019)	Federal Regional Court of the 3rd Region, Judicial Section of Pará	Injunction partially granted. The plaintiffs filed an appeal.	The set of eight lawsuits filed by IBAMA, seeking redress for environmental and climate damage based on a Notice of Infraction for depositing timber without an environmental licence. Main norms used: Art. 5 of the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88) Art. 225 of the 1988 Constitution of the Federative Republic of Brazil (CRFB/88) National Environmental Policy - PNMA (Federal Law 6.938/1981) National Policy on Climate Change - PNMC (Federal Law 12.187/2009)	The preliminary injunction partially granted the seizure of assets. However, it was ruled that applying the social cost of carbon was not feasible due to the lack of technical subsidies.
<i>IBAMA vs. V. de Souza Brilhante EIRELI</i> (1003478-16.2018.4.01.3100) (2018)	Federal Regional Court of the 3rd Region, Judicial Section of Amapá	Judgement upheld. In the enforcement phase.		The defendant was ordered (i) to make an obligation to restore the area and to draw up and fulfil a reforestation project for the deforested area, under penalty of a fine, and (ii) to pay compensation for property damage, if it is impossible to restore the degraded area, in an amount to be defined in the settlement phase, by arbitration, and (iii) and the obligation to pay for the social cost of carbon.
<i>IBAMA vs. Madeireira Madevi</i> (1000656-73.2018.4.01.3902) (2018)	Federal Regional Court of the 3rd Region, Judicial Section of Pará	Injunction partially granted. In progress.		A court order granted the injunctions. Regarding the "social cost of carbon", the court found it unfeasible to use it for the purposes of ordering the unavailability of the defendant's assets.
<i>IBAMA vs. Madelin Madeireira Linhares LTDA</i> (1001659-42.2018.4.01.4200) (2018)	Federal Regional Court of the 3rd Region, Judicial Section of Roraima	Case dismissed. IBAMA filed an appeal, which has not yet been judged.		In 2020, the court of first instance dismissed the lawsuit on the grounds that IBAMA had no legal standing. According to the first instance court, there was no interest on the part of the Union, due to the principle of predominance of interests in the distribution of environmental jurisdiction. The appeal court has not yet spoken out.
<i>IBAMA vs. Indústria, Comércio, Importação e Exportação de Madeiras Floresta Verde Ltda.</i> (1000083-80.2019.4.01.3908)	Federal Regional Court of the 3rd Region, Judicial Section of Pará	Partially favourable decision. Although the judge ordered enforcement of the decision, the		A first-degree verdict ordered the defendant to recompose the degraded area by drawing up a reforestation plan; to

(2019)		defendant claims that he was not notified of the first-degree ruling. The start of the enforcement of the decision is under discussion.		pay the amount based on the social cost of carbon, by depositing it in a judicial account; and to forfeit or suspend the defendant's participation in lines of financing offered by official credit establishments and to forfeit or restrict access to incentives and tax benefits offered by the government.
<i>IBAMA vs. Seringal Indústria e Comércio de Madeiras EIRELI</i> (1000364-26.2019.4.01.3200) (2019)	Federal Court of the 3rd Region, Amazonas Judicial Section	Preliminary injunction dismissed. Favourable decision. Defendant filed an appeal arguing that there was no causal link.		First-degree decision sentenced the defendant: (i) to recover the degraded area (ii) in the alternative, in the event that it was impossible to recover the area at issue, to pay compensation, (iii) to pay compensation corresponding to the social cost of carbon (SCC). The appeal court has not yet spoken out.
<i>IBAMA vs. Gabriel Indústria e Comércio Madeiras EIRELI</i> (1000185-42.2018.4.01.3907) (2018)	Federal Court of the 3rd Region, Judicial Section of Pará	Preliminary injunction dismissed. Sentence partially upheld. No appeals have yet been lodged.		First-degree court judged the claim to be partially upheld. The court dismissed the claim for an obligation to pay in relation to the social cost of carbon, given that there is no consensus - which in reality is impossible due to the obvious scientific uncertainties surrounding the issue - and no parameters, whether jurisprudential, legal or within the scope of specialised doctrine, for fixing the damage in question.
<i>IBAMA vs. Alto Norte Indústria, Comércio e Exportação de Madeiras Ltda.</i> (1000200-41.2018.4.01.3606) (2018)	Regional Court of the 3rd Region, Judicial Section of Mato Grosso	In progress.		-

Source: PIRES, Julia Stefanello.

The cases will be examined under the following comparative points: (i) who the plaintiffs and defendants are; (ii) where the litigation was filed; (iii) the competence of the court in which it was filed; (iv) the international norms used in the lawsuits; (v) the concepts and structures used to shape the idea of climate responsibility and/or liability; (vi) the human rights implied; (vii) the theories of justice presented and, in cases where the courts have spoken, (viii) the position of the court within the criteria listed above.

a) Ministério Público do Estado de São Paulo vs. KLM (Airlines Case, 2018)

In 2010, the São Paulo Public Prosecutor's Office (MPSP) filed over 30 climate cases³⁹⁴ against all the airlines operating at André Franco Mottoro São Paulo International Airport in the Cumbica neighborhood of Guarulhos city. To illustrate the debate in the Airlines Case, we will analyze the information from the case brought against KLM Royal Dutch Airlines, referred to as KLM.

KLM is a Dutch³⁹⁵ airline that provides air transportation services to various destinations in Brazil. One of its destinations in Brazil is São Paulo André Franco Mottoro International Airport located in the Cumbica neighborhood of Guarulhos. The jurisdiction of the court in this case was based on the location of GHG emissions during aircraft take-off and landing, as claimed by the plaintiff.

The cases were based on studies conducted by the International Civil Aviation Organisation (ICAO) and the IPCC, which revealed that civil aviation activities generate high rates of GHG emissions. The plaintiffs did not use any international standards or treaties in the argumentative construction of the case. To establish the defendant's liability, they argued about the aircraft passenger occupancy rate, the volume of baggage, which can increase airline emissions, and the responsibility of these companies for their contribution to the causes of climate change. None of the lawsuits succeeded, and most of them were deemed incompetent.

³⁹⁴ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público do Estado de São Paulo vs. KLM. Petição Inicial. Available at: <https://www.litiganciaticlimatica.juma.nima.puc-rio.br/visualizacao/Mw2fD5y3lPwot9xcDNKq;data=noEdit>; Accessed 21 Feb 2024.

³⁹⁵ According to information published by the company on its official website: <https://www.klm.com.br/information/corporate/company-profile>; Accessed 21 Feb 2024.

As for the decision in the case brought against KLM, the claim was dismissed at first instance. The court held that "the mere emission of CO₂ or other polluting gases, in itself, is not sufficient to typify an unlawful act"³⁹⁶, which was upheld on appeal. The dispute reached the Superior Court of Justice (STJ). The higher court held that not only was there no unlawful act, but also that the MPSP "(...) intended to impose an unforeseen regulation"³⁹⁷. Although pioneering and open to scrutiny, the MPSP's attempt was unsuccessful.

The case was filed more than a decade ago, when the National Civil Aviation Agency (ANAC) didn't even have specific regulations on GHG emissions for aviation business. The original arguments also pre-date the commitments made in the Paris Agreement. However, it shows how this quest to define the companies' climate liability is not a new debate on the Brazilian agenda. The STJ decision, however, dates back to 2020, a decade after the case was brought before the court of origin. In the meantime, many things have happened in the development of climate protection, such as the signing of international treaties, new regulations and laws establishing standards that could change the argumentative configuration of the lawsuit. The length of time between the case being filed and the final decision points to a challenge to be faced in Brazilian climate litigation: the slow pace of the judicial system. This study is not intended to address the challenges and procedural landscape of climate litigation. However, this detail cannot be ignored when the case is analysed. In the STJ Special Appeal (REsp) judgement, the court even highlights the attempts by ANAC and other regulatory bodies to regulate these emissions.

This case was a pioneer in Brazil, and led to interesting debates about

³⁹⁶ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público do Estado de São Paulo vs. KLM. Sentença de primeiro grau. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2FMw2fD5y3lPwot9xcDNKq%2F04_Ac%C3%B3rd%C3%A3o_Contesta%C3%A7%C3%A3o_MPSPvs.KLM.pdf?alt=media&token=1a95167a-6417-4e8c-99ba-c788ef63ba50; Accessed 21 Feb 2024.

³⁹⁷ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil**: Ministério Público do Estado de São Paulo vs. KLM. Decisão em Recurso Especial. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2FMw2fD5y3lPwot9xcDNKq%2F05_Decisa%CC%83o_REsp_MPSPvs.KLM.pdf?alt=media&token=45be0ccd-2813-4624-a766-98ffb981d7db; Accessed 21 Feb 2024.

liability, including territorial delimitation, types of damage included and the context of the company's operations, which should be considered when defining its liability. An interesting point, for example, is the plaintiff's argument regarding aircraft occupancy rates and the weight of the luggage they carry. These elements are essential for the increase or decrease in GHG emissions, because a lower occupancy rate requires more flights to be made, which increases emissions from the activities of these companies. It can be concluded that, despite the arguments based on scientific data, the regulatory basis was not yet structured to define the legal causality of this cause-and-effect relationship. This is a different context from the one found today, as discussed in the framework below.

b) A set of eight actions proposed by the IBAMA (2018 e 2019)³⁹⁸

Eight lawsuits have been filed by IBAMA, a federal agency responsible for environmental inspection and applying administrative penalties for environmental protection and management rules. The agency is linked to the Ministry of the Environment (MMA) and has administrative and financial autonomy according to Article 2 of Law 7.735 of 22 February 1989. The lawsuits were filed based on infraction notices that identified warehouses with logs that had not been adequately regularised. This could mean that the defendants might be selling illegal timber. IBAMA points out that this is one of the largest infraction notices issued by the Autarchy regarding the storage of wood without proven origin in recent years. Additionally, this issue is aggravated by illegal logging in indigenous territories.

As for the defendant parties, these were the companies that owned the warehouses in Brazil's North and Centre-West regions. One company in the state of Mato Grosso (Alto Norte Indústria, Comércio e Exportação de Madeiras Ltda.), one in Amazonas (Seringal Indústria e Comércio de Madeiras EIRELI), one in Amapá (V. de

³⁹⁸ Cases filed by IBAMA: IBAMA vs. Madeira Nova Aliança (1000275-31.2019.4.01.3902); IBAMA vs. V. de Souza Brilhante EIRELI (1003478-16.2018.4.01.3100); IBAMA vs. Madeireira Madevi (1000656-73.2018.4.01.3902); IBAMA vs. Madelin Madeireira Linhares LTDA (1001659-42.2018.4.01.4200); IBAMA vs. Indústria, Comércio, Importação e Exportação de Madeiras Floresta Verde Ltda. (1000083-80.2019.4.01.3908); IBAMA vs. Seringal Indústria e Comércio de Madeiras EIRELI (1000364-26.2019.4.01.3200); IBAMA vs. Gabriel Indústria e Comércio Madeiras EIRELI (1000185-42.2018.4.01.3907); IBAMA vs. Alto Norte Indústria, Comércio e Exportação de Madeiras Ltda. (1000200-41.2018.4.01.3606).

Souza Brilhante EIRELI), one in Roraima (Madelin Madeireira Linhares LTDA) and four in Pará (Madeira Nova Aliança, Madeireira Madevi, Indústria, Comércio, Importação e Exportação de Madeiras Floresta Verde Ltda, Gabriel Indústria e Comércio Madeiras EIRELI). The claims were filed in the Judicial Sections of the Federal Regional Courts of each state. The Federal Jurisdiction was based on the fact that the plaintiff is a federal autarchy, as established in article 109, item I of the Federal Constitution. The cases are centred on domestic regulations, such as the Federal Constitution and the PNMA, and do not focus on any specific international regulations.

The plaintiff argues that objective civil liability can be applied in environmental matters³⁹⁹ as per Article 225, Paragraph 3 of the Federal Constitution. They also assert that even if such liability for environmental damage is not considered, the objective liability due to the risk of the activity can be enforced under Articles 186 and 187 of the Civil Code, along with the sole paragraph of Article 927 of the Civil Code. Furthermore, they suggest applying the theory of integral risk, discussed in the third chapter, in which the materiality and perpetration of the damage would be sufficient.⁴⁰⁰

It has been proven that the defendants were the owners of the place where the illegal wood was stored. The storage of illicit forest products without proper proof of their origin or regularity in the defendants' possession has caused specific damage. Such storage of illegal products could lead to environmental damage. IBAMA's approach is based on the premise that storing illegal forestry products indicates the wood's uncertain origin, which results from illegal logging. As a logical conclusion, illegal deforestation leads to the immediate death of animals, soil erosion, and long-term soil impoverishment and desertification in deforested regions. Moreover, IBAMA specifically addresses global warming as a consequence of such damage. It claims that "the Defendant's illicit

³⁹⁹ The plaintiff used the same legal basis in all the lawsuits but changed the factual basis (such as the number of infraction notices, quantity and quality of the wood found, location, etc.). For this reason, the leading source used for the analysis will be the Initial Petition presented in the IBAMA vs. Madeira Nova Aliança case. Cases with different characteristics will be brought into the debate to complement it.

⁴⁰⁰ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil:** IBAMA vs. Madeira Nova Aliança. Petição Inicial. Available at: https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2FK9lw3URrnZu3Km3DuLdu%2F01.Peticao%20inicial%20_IBAMAvs.Madeira%20Nova%20Alianca.pdf?alt=media&token=d884bc59-4758-4c4b-96de-cb6189a715e8; Accessed 20 Feb 2024.

conduct has deprived the planet of the carbon absorption power on which the Forest relies but has also caused the release of carbon into the atmosphere"⁴⁰¹. As for causality, they apply the theory of alternative causality, also discussed in the third chapter.

IBAMA has demanded that the defendants take two specific actions to repair the damage caused. The first is the "obligation to do", which requires them to restore the vegetation in the areas that were deforested. The second is the "obligation to pay", which is calculated based on the social cost of carbon (SCC). This obligation to pay is based on a number of environmental principles, including the polluter pays and the negative externality of climate change. The CSC would be the estimated cost of the "(...) impact that an incremental unit of greenhouse gas released by the emission source has on the environment". This impact is measured at the local, regional, and global levels, and is determined using a methodology developed by the Environmental Protection Agency (EPA):

(...) using this method for climate damage enables the assessment of damage values in the past and their correlation with the present. Still, it also means that they can be correlated with the lasting effects of illegal greenhouse gas emissions in the future. Therefore, the calculation of the SCC involves the so-called discount rate. The discount rate in the social cost of carbon refers to the definition of the present value of impacts that will occur in the future. Thus, the value is defined for each period considered since the effects of emissions will be cumulative and synergistic over the years.⁴⁰²

As mentioned above, the cases were based on a theory of environmental justice using the work of Henry Acselrad⁴⁰³. In addition to this theory, these eight actions address intergenerational damage in greater detail. When pricing the social cost of carbon,

⁴⁰¹ DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil: IBAMA vs. Madeira Nova Aliança**. Petição Inicial. Available at: <https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2FK9lw3URrnZu3Km3DuLdu%2F01.Peticao%20inicial%20IBAMAvs.Madeira%20Nova%20Alianca.pdf?alt=media&token=d884bc59-4758-4c4b-96de-cb6189a715e8>; Accessed 20 Feb 2024.

⁴⁰² Translated by the author from: DIREITO, AMBIENTE E JUSTIÇA NO ANTROPOCENO (JUMA). **Plataforma de Litigância Climática no Brasil: IBAMA vs. Madeira Nova Aliança**. Petição Inicial. Available at: <https://firebasestorage.googleapis.com/v0/b/banco-de-dados-juma.appspot.com/o/docs%2FK9lw3URrnZu3Km3DuLdu%2F01.Peticao%20inicial%20IBAMAvs.Madeira%20Nova%20Alianca.pdf?alt=media&token=d884bc59-4758-4c4b-96de-cb6189a715e8>; Accessed 20 Feb 2024.

⁴⁰³ From the work: ACSELRAD, Henry. Justiça ambiental – ação coletiva e estratégias argumentativas. In: ACSELRAD, Henry. HERCULANO, Selene. PADÚA, José Augusto. (Org.) **Justiça ambiental e cidadania**. Rio de Janeiro: Relume Dumará, 2004.

they argue that those who bear or will bear the most significant impacts of climate change are not those who contribute to causing it. The plaintiffs explained that intergenerational damage is one of the impacts on the external marginal cost of economic exploitation resulting from high GHG emissions:

When a business fails to comply with environmental standards and becomes an illegal source of greenhouse gas emissions, thereby impacting on climate change, what they are actually doing is producing a external marginal cost to their activity that will have to be borne by society and not by the producer themselves.⁴⁰⁴

Different courts ruled differently even though the cases were based on similar arguments, as can be seen in Table 4 above. The most controversial point was about the SCC. In the cases of IBAMA vs V. de Souza Brilhante EIRELI; IBAMA vs Indústria, Comércio, Importação e Exportação de Madeiras Floresta Verde Ltda., and IBAMA vs Seringal Indústria e Comércio de Madeiras EIRELI, the claims were upheld, including payment of the SCC, based on the calculations presented by the plaintiff. In the case of IBAMA vs. Gabriel Indústria e Comércio Madeiras EIRELI, the court rejected the request for payment as a result of the SCC, taking the view that there is no consensus or parameters regarding the calculation of the SCC due to the apparent scientific uncertainties surrounding the issue, whether in jurisprudence, law or specialised doctrine, for fixing this type of damage.

As for the case of IBAMA vs. Madelin Madeireira Linhares LTDA, the first instance court dismissed the claim on the grounds that IBAMA had no legal standing to bring the action. This question was not addressed by any other court, and IBAMA appealed against the decision. Even when ruling on identical lawsuits, the courts have not reached a consensus in their decision.

Although these points should be analysed and are relevant to understanding

⁴⁰⁴ The same arguments were used in the set of lawsuits filed by IBAMA: IBAMA vs. Madeira Nova Aliança (1000275-31.2019.4.01.3902); IBAMA vs. V. de Souza Brilhante EIRELI (1003478-16.2018.4.01.3100); IBAMA vs. Madeireira Madevi (1000656-73.2018.4.01.3902); IBAMA vs. Madelin Madeireira Linhares LTDA (1001659-42.2018.4.01.4200); IBAMA vs. Indústria, Comércio, Importação e Exportação de Madeiras Floresta Verde Ltda. (1000083-80.2019.4.01.3908); IBAMA vs. Seringal Indústria e Comércio de Madeiras EIRELI (1000364-26.2019.4.01.3200); IBAMA vs. Gabriel Indústria e Comércio Madeiras EIRELI (1000185-42.2018.4.01.3907); IBAMA vs. Alto Norte Indústria, Comércio e Exportação de Madeiras Ltda. (1000200-41.2018.4.01.3606).

the approach to climate litigation in Brazil, there is one important detail. The cases filed by IBAMA are based on an illegal act: possession of illegal forest products. It is obvious that non-compliance with legally established standards, coupled with climate consequences, can result in an obligation to repair the damage caused. In these cases, climate impacts are just one of the consequences and damages to remedy.

After analysing the cases discussed in topics 4.2 and 4.4, it is evident that the discussion regarding corporate climate responsibility and liability is still in its early stages in Brazil. These cases have explored established concepts and applied them to climate issues. This is crucial in setting legal precedents for climate-related concepts and definitions, as discussed previously. However, based on our analysis, it is clear that there is still room for improvement in applying these concepts, as revealed in the following topic.

4.4. Corporate climate litigation perspectives in Brazil: responsibility and liability

The proposed framework introduces new perspectives for comprehending the implementation of corporate climate accountability. According to the research, corporate climate accountability has two aspects: (i) the preventive aspect, which involves preventing the causes and mitigating the effects, as analysed in the second chapter, with the aim of reducing GHG emissions in business activities; and (ii) the reparatory aspect, which pertains to accountability for the impacts on human rights associated with climate change. This aspect is analysed in the third chapter, which focuses on climate repair and adaptation activities.

These two aspects must be assessed and applied based on climate risk distribution, understanding that the search for corporate climate responsibility emerges from a theory of climate justice. This theory encompasses intergenerational and transnational impacts, with the knowledge that climate solutions must be analysed and thought through based on their unique characteristics.

Based on this premise, and an analysis of the existing regulatory frameworks, it is understood that: (i) the Brazilian legal system currently possesses the necessary tools and legal grounds to compel companies to take preventative measures against climate

change, or to mitigate their contribution to its causes. (ii) if companies do not take such preventative measures, the Brazilian legal system is equipped to hold them legally responsible for any damage caused by climate change due to their greenhouse gas emissions. To illustrate these points, the following tables have been provided:

a) Corporate climate responsibility: the duty to mitigate

Climate responsibility can be defined as the duty to mitigate the causes of and contributions to climate change. In other words, a duty of care that emerges from the scientifically proven knowledge that high GHG emissions are responsible for climate change, which in turn is linked to impacts and the worsening of human rights violations. Based on this premise, companies must mitigate their contribution to the causes, i.e. reduce their GHG emission rates. This duty to mitigate can be extracted from existing regulatory provisions, as shown in Table 5:

Table 5 - Corporate climate responsibility framework

CLIMATE RESPONSIBILITY	ARGUMENTATION APPLICABLE	NORMATIVE FORECAST (NATIONAL AND INTERNATIONAL)
	The duty to defend and preserve the environment for present and future generations. This duty does not only fall to the public authorities, but to the entire community, which includes companies.	Article 225 of the Brazilian Constitution.
	General principles of economic activity in Brazil include the social function of property, reduction of social and regional inequalities, and defence of the environment , including differentiated treatment according to the environmental impact of products, services, and production processes. It is important to note that climate damages are a type of residual damage resulting from environmental damages. Economic activities should be guided by these principles. In the context of climate change, companies that are aware of the consequences of their highly greenhouse gas-emitting activities and still pursue their expansion would be breaking these constitutional principles.	Article 170 of the Brazilian Constitution.
	The Brazilian Civil Code establishes civil liability. Given	Articles 186, 187 and 927 of the Civil Code. Law 11.105 of 2005 (Biosafety Law), which enshrined the precautionary principle.

	the nature of the causes and consequences of climate change, the preventive aspect of liability must be understood in the context of climate change as the duty to mitigate the causes of global warming.	Commitments and targets established in the Paris Agreement and the Brazilian NDCs. Commitment to respect human rights, based on the Guiding Principles on Business and Human Rights (UNGPs). 1992 Rio Declaration
	Commercial relations must be aligned with the social function of contracts and with the principles of probity and good faith. They must also aim to fulfil social interests, limiting the arbitrariness of the contracting parties to protect them within the community.	Articles 421 and 422 of the Civil Code. Commitments and targets established in the Paris Agreement and the Brazilian NDCs. Commitment to respect human rights, based on the Guiding Principles on Business and Human Rights (UNGPs).
	The duty to reduce GHG emissions is assumed in the commitment of the Paris Agreement. Based on the principles of economic activity in Brazil and the STF's recognition of the constitutional protection of environmental treaties, economic activities must align with this commitment.	Article 170 of the Federal Constitution. Commitments and targets established in the Paris Agreement and the Brazilian NDCs.

Soft law parameters can be considered when analysing the legal applicability of these concepts. For example, business' responsibility to respect human rights, as set out in the UNGPs and the OECD Guide discussed above. Although these parameters are not binding, commitments made by the state in which they operate, or even by the companies themselves, can be used to classify open concepts or add to existing regulations in the countries. In other words, the duty of care established in the application of the preventive aspect of responsibility, in addition to the establishment of relationships based on probity and good faith, must be understood to include public manifestations and commitments made towards their partners, clients, right holders or any other interested parties.

This sets the bar for the preventive aspect of corporate climate accountability. The next topic is dedicated to analysing the aspects for the normative configuration of climate liability. As follows.

b) Corporate climate liability: repairing climate damage

Climate liability can be defined as the duty to repair the impacts on human rights related to climate change. This liability is based on civil liability, which determines that anyone who causes damage to another person has a duty to repair it. For this to happen, damage, an unlawful act and a causal link must be established. Civil law alone does not provide rules that cover the specifics of the cause-and-effect relationships of climate change. However, the legal system, including international, constitutional and environmental protections, fill in any gaps that may be found. Table 5 below shows the configuration of these concepts in practical application based on climate assumptions.

As was established in climate responsibility, dealt with in the previous topic, elements of soft law and commitments made by states and companies should be used to fill regulatory gaps and conceptualise general norms. As seen below:

Tabel 6 - Corporate climate liability framework

CLIMATE LIABILITY	ARGUMENTATION APPLICABLE	NORMATIVE FORECAST (NATIONAL AND INTERNATIONAL)
	In the case of environmental damage, there is an objective liability, i.e. regardless of fault. The polluter must indemnify or repair the damage caused to the environment and third parties affected by their activity. There is also an obligation to repair the damage, regardless of fault, when the activity normally carried out by the perpetrator involves a risk to the rights of others. Application of the joint and several liability between all polluters who contribute to causing environmental damage. The theory of integral risk rules out exclusions of unlawfulness in the case of environmental damage from which climate damage arises.	Article 170 of the Brazilian Federal Constitution. Article 3, IV and 14, § 1 of the National Environmental Policy. Article 927 of the Civil Code.
	When there is damage to the environment, from which climate damage arises, there is no distinction between a lawful act, an unlawful act and an abuse of rights. Based on the premises of Environmental Law, if there is damage to the environment, the perpetrator is responsible for reparation. Damage caused by a lawful act occurs whenever the environment does not absorb the impacts of business activities, even if they are performed within permitted limits. In a climate context, the impacts of climate change	Articles 170 and 225 of the Brazilian Federal Constitution. Article 2 of the National Policy on Climate Change. Articles 186 and 187 of the Civil Code. Commitments and targets established in the Paris Agreement

	caused by high anthropogenic GHG emissions must be considered, even in lawful activities. Damage caused by an unlawful act is typified by unlawful activities performed outside the scope of the law, such as illegal deforestation or activities without an environmental licence. In the climate context, human rights impacts and GHG emissions must be analysed in the EIA or other studies for licensing business activities. Damage due to abuse of rights: this is typified by the general clauses of economic or social purpose, and by good faith. In the legal context of climate change, one could talk about the abuse of property rights, with abuse of rights occurring when a company, aware of the impacts related to climate change, continues to invest in and expand activities that are high emitters of GHGs. There would also be abuse due to a breach of good faith in the case of companies that make public commitments to respect human rights, based on the UNGPs, and climate targets, based on the Paris Agreement, and do not reflect these commitments in their actions.	and the Brazilian NDCs. Commitment to respect human rights, based on the Guiding Principles on Business and Human Rights (UNGPs).
	When assessing damage, two types of damage can be analysed: Climate damage: this is a residual type resulting from environmental damage, with the environment being an internationally recognised right with constitutional protection. Conceived as an injury to a diffuse interest, with modification of the environmental heritage, and which may result in impacts on personal rights. Damage to human rights related to climate impacts: in addition to impacting the human right to a clean and healthy environment, climate impacts can cause or aggravate other violations of human rights, such as health, access to education, housing, food, and life. In these cases, climate adaptation measures should be implemented in addition to reparation when possible and necessary. Damage (certain and uncertain) that has not yet materialised: from the principles of prevention (future and certain damage) and precaution (future and uncertain damage), consolidated in Environmental Law. In these cases, adaptation measures must be applied to existing damage (dealt with above), seeking to mitigate the intensity with which it is felt and to future damage or damage that is in the process of materialising.	Articles 170 and 225 of the Federal Constitution. Article 2 of the National Policy on Climate Change (PNMC). Law 11.105 of 2005 (Biosafety Law), which enshrined the precautionary principle. National Environmental Policy and CONAMA Resolution 001 of 23/01/1986 on Environmental Impact Assessment (EIA). Commitments and targets established in the Paris Agreement and the Brazilian NDCs. 1992 Rio Declaration
	There are different theories to define the climate causality. The Objective Theory of Causality, also known as <i>conditio sine qua non</i>, suggests that the conditions causing climate change are equivalent and that the greenhouse effect leading to climate imbalance can only occur if these conditions are combined. The theory of Equivalence of Causal Antecedents acknowledges the existence of multiple causes, but it aims	Article 927 of the Civil Code. Federal Law No. 6.938 of 1981, the National Environmental Policy, and CONAMA Resolution No. 001 of 23/01/1986, on the Environmental Impact Assessment (EIA). Commitments and targets established in the Paris Agreement

	to identify the cause that is capable of producing the result in a case where there are several causes. In the context of climate change, this theory can be applied to the entities that have the highest historical or current greenhouse gas emissions rates. The Alternative Causation Theory contends that a group's collective behavior can create a context for risk to materialize, and the resulting damage would be the outcome of this collective behavior. This theory has been explored in climate litigation and is perhaps the most applicable in situations where it is challenging to determine individual responsibility for the damage resulting from joint activities.	and the Brazilian NDCs. 1992 Rio Declaration
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Climate liability should consider the damages caused by and related to climate change. These damages can be environmental or related to human rights, and are often intertwined. In fact, the right to a healthy environment is already recognized as a human right.

The biggest challenge is determining the causal relationship between climate change and its effects. This relationship is different from the standard patterns of the legal system, but it is still possible to establish it. Existing legislation offers avenues to explore in this regard. However, it is crucial to remember the urgency of the issue and to respond effectively to safeguard human rights. Those who have already been affected by climate change must be redressed.

CLOSING REMARKS

“Today’s children, and their children, are the ones who will live with the consequences of climate change”

(Unless we act now: The impact of climate change on children, UNICEF)

After analysing this work, the first thing to consider is the need to involve non-state actors, particularly companies, in taking on climate responsibilities. The capitalist economic and consumer system produces more excellent and cheaper goods and products, often leading to the exploitation of human beings and the environment, and environmental and social dumping is common to increase profits and reduce costs in company productivity. These exploitative practices result in socio-environmental damage, which prevents the sustainable social development of affected regions, communities, and groups. According to Beck⁴⁰⁵, environmental risks (and consequently, climate risks) can be distributed and categorized as threatening or class based. Addressing these issues requires complex solutions, as it involves actors who, in addition to profiting from this exploitation, are relatively protected from its consequences. This conclusion is drawn from the debates presented in the first chapter. Concerns regarding the impacts of climate change are not new. As discussed in the second and third chapters, international studies and documents on the subject date back decades.

Recognizing companies as the primary contributors to greenhouse gas (GHG) emissions is the outcome of a comprehensive analysis of the entire production process of business activities, which involve several critical sectors in the strategy to reduce GHG emissions, such as energy, transport (aviation, automobiles, etc.), industry, and waste management⁴⁰⁶. Hence, the scope of this contribution can be viewed from various aspects: optimizing energy consumption and incorporating clean energy in the production process, implementing more efficient logistics for transporting goods with reduced use of fossil

⁴⁰⁵ BECK, Ulrich. **Sociedade de Risco**: rumo a uma outra modernidade. São Paulo: Editora 34, 2010.

⁴⁰⁶ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). **Climate Change 2007: Mitigation**. Contribution of Working Group III to the Fourth Assessment. Report of the Intergovernmental Panel on Climate Change, Cambridge, Nueva York, Cambridge university Press, 2007.

fuels, establishing proper waste disposal mechanisms with regular monitoring, and so on.

Companies often engage in activities that result in high greenhouse gas (GHG) emissions without taking necessary steps to prevent or reduce the impacts of climate change. However, the emission of GHGs becomes a risk to the business itself. Regardless of the company's fault or intent, it must occur for the industry to reap its benefits. In this line of thought, it is essential to understand that the damage to human rights related to climate change is ongoing and accumulates over time. Therefore, there is a need to think of ways to engage non-state actors, particularly companies, to help prevent or at least mitigate the damage caused by climate change. As these companies benefit from the profits generated by climate risk, it is crucial to find effective ways to engage them in this effort.

The research can conclude that corporations that contribute to GHG emissions must be held responsible for monitoring and fulfilling human rights. This involves discussing effective solutions for preventing and repairing damage. It is necessary to connect these themes and demonstrate the importance of debate, to create a more responsible, supportive, and fair business scenario. It is essential to emphasize that protecting environmental rights, especially those related to climate change, is crucial for effectively exercising human rights.

Based on the given context, climate accountability refers to a responsibility "to" or "in relation to" another person⁴⁰⁷. This accountability covers two aspects: (i) preventive: it is based on the duty to avoid causing any harm or violation of another person's right. This aspect was analysed in the second chapter and consolidated in Table 5 of the fourth chapter. It refers to the duty to mitigate and is called climate responsibility in the study; (ii) reparatory: it is based on the duty to fix the violations of the rights of others to which it has caused or contributed. This aspect was addressed in the third chapter and consolidated in Table 6 of the fourth chapter. It is called climate accountability in the study. In summary, climate responsibility refers to preventing any harm or violation of

⁴⁰⁷BRUNNÉE, Jutta. GOLDBERG, Silke. LORD, Richard. RAJAMANI, Lavanya. Overview of legal issues relevant to climate change. In: **Climate change liability**: transnational law and practice / [edited by] Richard Lord ... [et al.]. y Cambridge University Press, New York, 2012.

another person's rights, while climate accountability refers to repairing any damage caused to the rights of others.

Tables 5 and 6 demonstrate that there are rules in the current legal system which can be utilized to determine the responsibility and climate liability of companies. However, this determination requires subjective elements in defining open concepts established in Civil and Environmental Law. It is possible to utilize the commitments made by companies, which are based on soft law documents such as the UNGPs and the Paris Agreement, to establish these subjective elements. Although these commitments may not be binding for companies that voluntarily agree to adhere to them, the guidelines outlined therein should be taken into account in the construction of principles that should guide corporate action and economic activity. These principles include good faith, probity, the social function of contracts and property, as well as the duty to defend and preserve the environment. These documents can even be used as the basis for characterizing the elements that define the applicable penalties, such as determining reparation criteria according to the level of the company's relationship with the cause or contribution to an impact on human rights, as established in Guiding Principle 16. However, this point requires further study.

A critical point to note in the conclusions of this study, as demonstrated by analysing emblematic climate litigation cases in other countries (Tables 1 and 2 in Chapters 2 and 3, respectively), is the significance of establishing fundamental concepts that support climate protection in higher courts. The ruling in *Neubauer et al. v. Germany*⁴⁰⁸ and the decision in *Urgenda Foundation v. State of the Netherlands*⁴⁰⁹ are particularly noteworthy as they set legal benchmarks that facilitated the advancement of the debate in subsequent climate litigation. This year, the ADPF 708⁴¹⁰ decision in Brazil

⁴⁰⁸ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** *Neubauer, et al. v. Germany*. 2020. Available at: <https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>; Accessed 01 Feb 2024.

⁴⁰⁹ SABIN CENTER FOR CLIMATE CHANGE. **Global Climate Change Litigation Platform:** *Urgenda Foundation v. State of the Netherlands*. Duty of care under Articles 2 and 8 ECHR. Reduction greenhouse gas emissions. Available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf; Accessed 10 May 2021.

⁴¹⁰ SUPREMO TRIBUNAL FEDERAL (STF). *Arguição de Descumprimento de Preceito Fundamental 708*. Distrito Federal, 2022. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15353796271&ext=.pdf>; Accessed: 10 Jan 2024.

recognized environmental treaties as a type of human rights treaty, representing a significant legal milestone in the Brazilian context. Establishing these concepts is critical for advancing climate debates and solidifying the actual protection of human rights and the environment through the application of existing norms.

Establishing the causal link based on legal parameters is one of the main challenges. In countries like Brazil and Germany, the law does not define the causal link, and it is interpreted based on theories that connect the cause and the consequences of the actions that caused the damage. Some of the theories already consolidated and applied have characteristics that would allow the application of climate causality. However, for this to be possible, the interpretation must consider the principles and prerogatives of the climate context. It is important to understand the existing legal protection and the particularities of the issue to propose solutions that the urgency of the matter demands.

After conducting the analysis, it is clear that climate risks are becoming more certain and visible. The impacts of these risks are gradual and cumulative, which means that the people who will be most affected may not have even been born yet. The economic benefit generated by exploiting these activities protects those who receive them from the most extreme impacts. If there are legal means of protection and reparation for these impacts, they must be applied and interpreted as a matter of urgency. As the German court concluded in the Neubauer case, even if the responsibility for emissions cannot be attributed to a single actor, this cannot justify states and companies failing to take responsibility for their part in it.

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