

# 1 The applicability of the transnational due diligence concept to global warming

Subpart 1.1 demonstrates the applicability of international customary due diligence to climate change. Subpart 1.2 shows that protecting human rights also requires States and companies to conduct due diligence and mitigate global warming. Subpart 1.3 lastly argues that due diligence norms in domestic tort legal regimes also apply to climate change.

## 1.1 International general due diligence applicable to climate change

As seen in the introduction, the concept of due diligence is nothing new. In fact, international legal bodies began to apply the due diligence principle as early as the 1872 *Alabama* case<sup>198</sup>. More recently, in 2010, the ICJ recognised the applicability of due diligence to environmental harms, as discussed in section 0.2.1 of the introduction<sup>199</sup>. Does that mean that the basic norm of due diligence applies to climate change?

Before providing an analysis to respond to this question, one needs to recall that the climate conventions UNFCCC, Kyoto Protocol, and Paris Agreement made reference to the international no-harm rule and due diligence principle. Additionally, numerous small island States declared that the climate regime (i.e., the UNFCCC, KP and PA) does not preclude the applicability of customary international law, which provides for general due diligence, and “shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change”<sup>200</sup>. Some authors provided early reactions to those opin-

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198 Tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, *Alabama claims of the United States of America against Great Britain*, 14 September 1872.

199 ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, I.C.J. Reports 2010, § 102.

200 See the declarations of the small island States regarding the UNFCCC here: <https://unfccc.int/cop5/resource/docs/cop5/inf02.htm>, last accessed 28 October 2025, and the Paris Agreement here: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsg_no=XXVII-7-d&chapter=27&clang=_en), last accessed 28 October 2025.

ions. For instance, Zahar contended that international climate conventions constitute *lex specialis*, rendering general principles of customary international law such as due diligence inapplicable (see below the corresponding subsection 1.1.2.3 on *lex specialis*)<sup>201</sup>.

The International Law Commission (ILC – mandated by the UN General Assembly to develop and codify international law) addressed this debate in its 2021 “Draft Guidelines on the Protection of the Atmosphere”. It laid out that the customary due diligence rule applies with respect to any kind of atmospheric degradation, which should also include climate change<sup>202</sup>. However, the ILC recognised that this debate was still somewhat unsettled<sup>203</sup>, and did not benefit from a mandate itself to clarify this question<sup>204</sup>.

Nonetheless, the ITLOS argued in its 2024 advisory opinion that the due diligence rule contained in the Convention on the Law of the Sea applies to climate change. The ICJ may have irrevocably settled this debate by subsequently confirming this view in its own advisory opinion on the issue, one year later in 2025<sup>205</sup>.

In the meantime, this thesis will proceed as follows to demonstrate the customary due diligence applicability to climate change: Section 1.1.1 demonstrates that due diligence, set out in the 2001 ILC’s Draft Articles on Prevention, applies to climate change. Section 1.1.2 argues that the UNFCCC and the PA lay out obligations which may be defined as due diligence; therefore, the convention system does not constitute international *lex specialis*, and does not derogate CDD. Finally, Section 1.1.3 briefly discusses whether CDD constitutes *jus cogens* or *erga omnes obligations*.

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201 Mayer B, “The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar” (2015) 5 *Climate Law*.

202 ILC, Chapter IV Protection of the Atmosphere, Draft Guidelines on the Protection of the Atmosphere, A/76/10, December 2021, commentaries of Guideline 1 (c) and 3.

203 *Ibid*, Guideline 3, commentary § 8.

204 At its 3197th meeting, on 9 August 2013 (Yearbook ... 2013, vol. II (Part Two), para. 168). The Commission included the topic in its programme of work on the understanding that: “(a) work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution.

205 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 138.

### 1.1.1 International customary due diligence applicable to climate matters

To analyse whether customary due diligence applies to climate change, this section relies on the 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities<sup>206</sup>, already mentioned in Section 0.2.1 of the introduction, as they lay out in the most comprehensive manner the theoretical framework for applying due diligence in international law.

As the title of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities makes clear, they apply in principle to “hazardous activities”. The current scientific findings of the IPCC and official statements of the UN Secretary General clearly show the dangerous character of anthropogenic global warming<sup>207</sup>. Given this feature of global warming, customary due diligence seems *a priori* applicable to global warming. Nonetheless, this PhD still discusses this issue in more depth in this first part, given its legal importance and its unsettled and controversial character, at least until recently.

To do so, subsection 1.1.1.1 argues that climate change meets the due diligence applicability criteria of the ILC Draft Articles on Prevention of Transboundary Harm; while subsection 1.1.1.2 addresses the corresponding “transboundary” criterion more specifically and argues that this notion – which overlaps with causation – does not rule out cumulative harms such as climate change.

#### 1.1.1.1 GHGs fulfilling the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities criteria

Those who oppose the recognition of CDD usually argue that the emission of GHGs does not pose an immediate danger to human health or the environment. They also argue that the impact of GHGs is diffuse and multifactorial, as opposed to the hazards of nuclear weapons or other transboundary pollution issues, such as the dumping of chemical substances in international watercourses (situations quoted by the ILC in the Draft

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206 Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two.

207 IPCC, AR6 (2021-23), WG II, SYR.

Articles Commentary as falling under their scope). Moreover, since GHGs pre-exist man-made climate change, CDD opponents consider that their presence may be perfectly natural<sup>208</sup>.

However, as the introduction laid out, GHGs become dangerous through their accumulation in the worldwide atmosphere, as they create a global imbalance in the atmosphere's natural chemical composition<sup>209</sup>. Given this cumulative character, CDD opponents such as Zahar refute the applicability as they consider that the contrary would mean that all activities may be labelled as dangerous since GHG emissions are a pervasive consequence of almost any activity.

In any event, this controversy requires an in-depth analysis of the applicability of due diligence to climate change. To do so, this subsection relies on the ILC Draft Articles on Prevention of Transboundary Harm, laying out applicability criteria regarding due diligence.

Article 1 of the Draft Articles on Prevention set out the applicability conditions: “[t]he present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.” More precisely, the ILC established four criteria in its commentary on Article 1 : (i) they must not be prohibited, (ii) the activities must fall under the State's jurisdiction, (iii) they must cause transboundary harm, and (iv) they must occur through their physical consequences.

Firstly, GHGs must not be prohibited under international law. Although GHGs are to some extent regulated by international law agreements (UN-

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208 The IPCC differentiates between “naturally-induced” and “man-made or anthropogenic” climate change. The latter phenomenon is due to some human activities, including “the burning of fossil fuels, deforestation, land use and land-use changes (LULUC), livestock production, fertilisation, waste management and industrial processes.

209 This man-made imbalance is mainly due to the use of “fossil fuels”, meaning coal, oil and gas. As humans use energy and fossil fuels in their daily lives, GHGs have accumulated over the last two centuries, ultimately creating a dangerous situation. In fact, 70% of the GHG stems from the extraction, production and consumption of fossil fuels. These fuels are deposits of organic material stored for decades, centuries or even millennia in the geological substrata, mainly made up of carbon compounds (for coal and oil) and methane (for gas). Hence, when humans burn hydrocarbons for energy purposes, they basically extract the carbon and methane stored in the ground for millions of years and release them into the atmosphere. The same process basically happens with wood or other plants used as fuels (biofuels): plants capture CO<sub>2</sub> from the atmosphere, but burning them ultimately restores the carbon to the atmosphere.

FDCC and Paris Agreement), their release is not forbidden. All countries in the world continue to emit GHGs. It would be impossible to generally ban the emissions of anthropogenic GHGs, as some vital behaviours necessarily lead to GHG emissions, such as breathing.

The second criterion concerns jurisdiction and requires the regulation of activities taking place on the States' territories or falling under their jurisdiction or control to prevent harm to other States. This criterion does not seem to constitute any issue since GHGs may be physically emitted from one specific state (i.e., territorial emissions). As to indirect (extraterritorial) emissions, those also seem to be captured by the Draft Articles on Prevention, as the ILC noted in its commentary of Article 1, that States must intervene as soon as they have jurisdiction, potentially leading to situations of shared responsibility: “[i]n cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, *jointly* comply with the provisions of these articles” (on extraterritorial jurisdiction, see below the subsection 1.2.1.3 on international human rights law for more analysis).

The third criterion concerns the “risk of causing *significant* transboundary harm”<sup>210</sup>. Although there is a legal debate concerning the interpretation of the term “transboundary” (i.e., whether or not it encompasses cumulative causation, see just below subsection 1.1.1.2), it is clear that climate change causes *serious* or *significant* harm of different natures. The UN Secretary-General recently clarified in plain words that “we are already *perilously* close to tipping points that could lead to cascading and irreversible climate impacts.” Additionally, the recent IPCC reports made clear (SR 1.5 and AR6) that exceeding the 1.5°C threshold contains numerous risks of harm, besides tipping points risks, which may cause substantial additional global warming and irreversible and disastrous environmental changes. Since humanity is still on a pathway clearly incompatible with the Paris Agreement (3.2°C according to AR6<sup>211</sup>, 2.8°C with existing policies according to UNEP, and 2.5°C according to the IEA Stated Policies scenario<sup>212</sup>),

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210 According to Article 2 ILC’s Draft articles on Prevention of Transboundary Harm from Hazardous Activities, “Use of terms”: (a) “Risk of causing significant transboundary harm” includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm; (b) “Harm” means harm caused to persons, property or the environment”.

211 IPCC, AR 6, WG III, § C.1, p 21

212 IEA, WEO 2022, p 21.

and since “the window of opportunity to limit global warming to well below 2°C, preferably 1.5° [...] is closing rapidly”<sup>213</sup>, it seems clear that the current path is “dangerous”<sup>214</sup>.

Lastly, the fourth criterion concerns the causal effect of GHGs, as they must cause harm “through their physical consequences”<sup>215</sup>. The ILC specifies that the causing activity must differentiate itself from “transboundary harm which may be caused by State policies in monetary, socioeconomic or similar fields.”<sup>216</sup> Since GHGs are a consequence of almost any activity, they constitute a “physical link [that] connect[s] the activity with its transboundary effects”<sup>217</sup>. Even if GHGs might be activities allowed by State policies, including to produce economic growth, GHGs are not the *direct* result of economic policies, such as the establishment of free trade rules. It is also not an issue that GHGs mostly stem from private persons, as customary due diligence requires regulating the latter, by setting up an “appropriate regulatory framework”<sup>218</sup>. The ILC confirmed this stance in much more explicit terms in its recent “Guidelines on the protection of the atmosphere”:

“Significant adverse effects on the atmosphere are caused, in large part, by the activities of individuals and private industries, which are not normally attributable to a State. In this respect, due diligence requires States to “ensure” that such activities within their jurisdiction or control do not cause significant adverse effects. This does not mean, however, that due diligence applies solely to private activities since a State’s own activities are also subject to the due diligence rule.”<sup>219</sup>

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213 UNEP, “Emissions Gap Report 2022: The Closing Window”, 2022, p 1.

214 See also CRC, *Sacchi et al v Argentina et al*, Decision concerning France, CRC/C/88/D/106/2019, 8 October 2021, § 10.12.

215 ILC, Chapter IV Protection of the atmosphere, draft guidelines on the protection of the atmosphere, A/76/10, Article 1 commentary, § 17.

216 ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, Text adopted by the ILC at its fifty-third session in 2001 (A/56/10), Article 1 Commentary, § 16.

217 *Ibid*, Article 1 Commentary, § 17.

218 *Ibid*, Article 5 Commentary, § 3.

219 ILC, Chapter IV Protection of the atmosphere, draft guidelines on the protection of the atmosphere, A/76/10, Article 3 commentary, § 6.

1.1.1.2 Transboundary criterion and compatibility with cumulative causation

As for the “transboundary” requirement and its compatibility with climate change, lawyers such as Zahar challenge the applicability of these articles to climate change since it is not a “transboundary” damage occurring “in a short timeframe and in a confined space” but rather a “cumulative” and “global” one<sup>220</sup>. A great – and still, to some extent unresolved – debate exists in this regard, as environmental and liability law more generally has traditionally only related to local or regional harms. As climate change emerges as a genuine global legal issue, its apprehension by general international law (and domestic liability law) causes difficult issues of reconciliation with some legal pillars, especially causation in the wider sense, as one actor cannot cause global warming on its own. For Mayer, who engaged in a confrontational debate with Zahar in the international legal literature<sup>221</sup>, “[d]ifficulties in implementing the principle of prevention with regard to cumulative damage are not a sufficient reason to reject the application of this principle, although they may require particular modalities of application.”<sup>222</sup>

Beyond Mayer’s position, numerous highly relevant institutional authorities seem to point to the compatibility of the transboundary criterion with climate change: firstly, the UNFCCC preamble refers to the recognition of the no-harm principle under international law<sup>223</sup>. In turn, the ILC 2001 Draft Articles on Prevention quote the UNFCCC and the Vienna Convention for the Protection of the Ozone Layer<sup>224</sup> (the Protection of

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220 Zahar A, “Mediated versus Cumulative Environmental Damage and the International Law Association’s Legal Principles on Climate Change”, *Climate Law*, 4(3–4), 2014 p 217, 229; see as well Mayer B, “The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar” (2015) 5 *Climate Law* p 1-24.

221 Zahar and Mayer are both international law Professors specialising in the climate field by regularly publishing on that issue in prestigious journals and authoring books. What may distinguish them beyond their scientific rigour may certainly be their prolific and thought-provoking articles in which one responds to the other’s arguments, akin to submissions in a contentious legal case. They even co-edited an academic book on this issue, publishing it in a “traditional debating-style” format (see Mayer B and Zahar A (Editors), *Debating Climate Law*, Cambridge University Press, 2021).

222 Mayer B, “The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar” (2015) 5 *Climate Law* p 13.

223 UNFCCC, preamble, page 1.

224 See ILC Draft Articles, Footnote 923 p 162 and § 5 of Article 13 commentary, p 166.

the Ozone Layer is another global issue resulting from cumulative diffuse contributions). The ILC's work on the protection of the atmosphere also hints at the applicability of the due diligence obligation in the realm of climate change (see Guidelines 1 in combination with 3), but, as pointed out above, this work suffered from a weak mandate on certain aspects – especially concerning climate change – since the purpose of the work was subject to an *understanding* which was aimed to not “interfere with relevant political negotiations, including on climate change”<sup>225</sup>. However, while the Draft Guidelines themselves do not explicitly mention climate change, the General commentary does so multiple times, and was also adopted by the ILC. Moreover, the ILC commentary on guideline 2, which addresses the definition of atmospheric pollution and degradation, states that “climate change and depletion of the ozone layer are the two principal concerns leading to atmospheric degradation”.

Moreover, legal bodies accept addressing GHG and climate change in the framework of international law or domestic law, by partly relying on customary international law and recognising the basic tenet, following which each GHG emission *contributes to* and *aggravates* global warming. Examples of this approach include the US Supreme Court in *Massachusetts*<sup>226</sup>, the Dutch Supreme Court in *Urgenda*<sup>227</sup>, the German Constitutional Court in *German Climate Protection Act*<sup>228</sup>, the French Supreme Court in *Grande-Synthe*<sup>229</sup>, the Paris Court in *Notre Affaire à tous et al v France* or “*l'affaire du siècle*”<sup>230</sup>; the HRC in *Torres Strait Islanders Petition*<sup>231</sup>; the CRC in

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225 ILC, Chapter IV Protection of the atmosphere, draft guidelines on the protection of the atmosphere, A/76/10, p 9, footnote 6.

226 SCOTUS, *Massachusetts et al v EPA*, opinion of the Court, 549 U. S. \_\_\_\_ (2007), p 20.

227 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 4.6 and § 5.7.5.

228 Constitutional Court of Germany (*Bundesverfassungsgericht*), 1 BvR 2656/18, 24 March 2021, headnotes 1 and 2 (c);

229 Supreme Administrative Court (Conseil d'Etat), *Grande-Synthe*, n° 427301, 19 November 2020, § 12.

230 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 21.

231 Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, *Daniel Billy et al v Australia*, CCPR/C/135/D/3624/2019, 22 September 2022, § 7.8 and 8.3.

*Sacchi et al v Argentina et al*<sup>232</sup>, and five other HRTBs<sup>233</sup>. While these legal bodies did not *directly* apply general international law, some still considered the ILC Draft Articles on State Responsibility (DARSIWA). For instance, the Dutch Supreme Court explicitly referenced the international no-harm principle and the UNFCCC in the *Urgenda* case to justify the “Joint responsibility of the states and partial responsibility of individual states”. Following this line of thought, the Dutch Supreme Court therefore considered that due diligence requires all individual States to “make their contribution to reducing greenhouse gas emissions”<sup>234</sup>. Equally, the CRC in *Sacchi* referred to Art 47 (3) Draft Articles on State Responsibility to ground the joint and individual responsibility of States in the realm of climate change<sup>235</sup>.

More precisely, since the word “cumulative” implies multiple factors, which is the case with climate change, triggered by the GHGs of an almost infinite number of authors, Article 47 ILC DARSIWA addresses the “plurality of responsible States in relation to the same internationally wrongful act”. The corresponding ILC commentary states that:

“(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.<sup>719</sup> Yet, it was not suggested that Albania’s responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility

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232 CRC, *Sacchi et al v Argentina et al*, Decision concerning France, CRC/C/88/D/106/2019, 8 October 2021, § 10.10.

233 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019, § 3 and 5.

234 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 5.7.5.

235 CRC, *Sacchi et al v Argentina et al*, Decision concerning France, CRC/C/88/D/106/2019, 8 October 2021, § 10.10.

of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.”

Interestingly, this passage by the ILC of its DARSIIWA refers to the *Corfu Channel* case in which the ICJ brought the due diligence principle for the first time to the fore (no-harm principle). In this case, the ICJ imposed different individual obligations on the States involved to ensure that harm does not occur. Thus, due diligence fits well with a cumulative causation situation, since it imposes on all actors an independent obligation to prevent harm in case of knowledge and capacities, meaning that each actor must do its share.

Additionally, the “Guiding Principles on Shared Responsibility”<sup>236</sup> further developed the principle of multiple co-authors in the case of “Shared responsibility arising from multiple internationally wrongful acts”:

“International persons share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct consisting of an action or omission that: (a) is attributable to each of them separately; and (b) constitutes a breach of an international obligation for each of those international persons; and (c) contributes to the indivisible injury of another person.”

According to the Commentary, this principle encompasses the notion of cumulative contribution to an indivisible injury (such as climate change) besides “concurrent contributions”<sup>237</sup>. Hence, according to these Guiding Principles, drafted by recognised international law professors, shared responsibility for cumulative harms (including climate change) is possible. To do so, a certain conduct must be “attributable to each of the international persons separately”, meaning that “separate wrongful acts are committed by each of those international persons.”<sup>238</sup> In other words, one must breach one of its legal obligations, such as due diligence, to find shared responsibility<sup>239</sup>. Section 2.2.2 addresses the link between causation and attribution in

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236 Nollkaemper A et al, “Guiding Principles on Shared Responsibility in International Law” (2020) 31(1) *European Journal of International Law* p 15 – 72.

237 *Ibid*, Principle 4, Commentary, § 1.

238 *Ibid*, Principle 4, Commentary, § 2.

239 *Ibid*, Principle 4, Commentary, § 3.

more detail, which links the direct and indirect GHG emissions of private parties to State responsibility, including so-called “scope 1-3” emissions<sup>240</sup>.

Other eminent international law Professors – already quoted above (see Voigt, Rajamani, Maljean-Dubois) – agree with this interpretation. For instance, Maljean-Dubois argues that:

“GHG emission increases the risk of specific harm by adding, in cumulative terms, to the GHG already present in the atmosphere. Thus, one could suggest that causation could be established on the sole basis of *contribution* to the problem of climate change by a specific actor. The issue of how much damage might have been caused by this contribution is irrelevant in this respect, although it will play a role at the stage of apportioning costs (Voigt, 2008, 16).”<sup>241</sup>

In light of the foregoing, the issue of GHG emissions causing global warming should fall under the scope of the ILC Draft Articles, and more generally under the scope of customary international law. Therefore, according to Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm, every State shall take all appropriate measures to reduce its GHG to prevent significant transboundary harm related to global warming or, in any event, to minimise the risk thereof, including by regulating private actors. The ICJ, or any other tribunal, may also impose injunctions, in the form of provisional measures, cessation, guarantee of non-repetition, as a Tribunal did in the *Trail Smelter* case<sup>242</sup>, or the ICJ discussed, for instance in *Certain Activities Carried Out by Nicaragua in the Border Area*<sup>243</sup>. The ICJ subsequently confirmed these options in its advisory opinion on climate change<sup>244</sup>.

The opposite finding (i.e., that general due diligence is not applicable to climate change) would mean that there is no general law governing climate change. This would be dangerous because each State would have unlimited

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240 See glossary for the definition of “scope 1”, “scope 2” and “scope 3” emissions.

241 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 26.

242 The *Trail Smelter* case also addresses the injunction issue in the international law context, with a parallel made with the nuisance claim under US law (see “Institution of régime to prevent future damages” in *Trail Smelter*, III UN Reports of International Arbitral Awards, 1905 (1941), p 1965).

243 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment, I.C.J. Reports 2015, p 665.

244 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 444 – 448.

freedom in this respect if it were no longer bound by the climate regime. This finding may also be unacceptable because of the potential *jus cogens* nature of due diligence in the climate field (see section 1.1.3 for further analysis in this respect).

Further, according to the 2006 ILC Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities<sup>245</sup>, “each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control”. Note that these principles apply without the requirement to establish fault or wrongful conduct<sup>246</sup>. Since the COP 27 decision already recognised that climate change caused numerous losses and damages<sup>247</sup>, States may already be under an obligation under general international law to ensure that climate-related victims are adequately compensated (see Part 3 and especially section 3.4.2 for more analysis in this respect).

The ICJ and the International Tribunal for the Law of the Sea (ITLOS) have confirmed in their advisory opinions that customary due diligence applies to climate change<sup>248</sup>. This dissertation further assesses their opinions, including the nature of the CDD requirements in subsection 2.3.4 on the redressability of these obligations.

### 1.1.2 The parallel applicability of customary and conventional CDD

According to some States and some authors of the legal literature, the climate conventions (UNFCCC, Kyoto Protocol and Paris Agreement) encompass due diligence and state that *general* due diligence requires tackling climate change (hence, CDD). If this position is correct, what is the added value of considering that the PA’s provisions contain due diligence?

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245 Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10). The report, which also contains commentaries on the draft articles, will appear in Yearbook of the International Law Commission, 2006, vol. II, Part Two.

246 Ibid, Principle 4 (2).

247 COP 27, “Sharm el-Sheikh Implementation Plan”, FCCC/CP/2022/L.19, 20 November 2022, § 27.

248 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 234 – 243; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 137 – 138.

Subsection 1.1.2.1 addresses the similarities between the conventional climate duties and due diligence from customary international law, including showing that the conventions require due diligence conduct from State parties, like the UNFCCC and the KP. Next, subsection 1.1.2.2. argues that the CDD concept usefully complements climate conventions due to its preexisting liability system, which one can claim if its rights are violated due to negligent conduct. Finally, subsection 1.2.2.3 demonstrates that the climate conventions are not *lex specialis*; therefore, they do not rule out the parallel applicability of customary due diligence.

### 1.1.2.1 The concretisation of general due diligence in the climate conventions

The climate conventions set out global objectives, principles and individual State obligations, which bear resemblances to the characteristics of due diligence. However, they remain as such almost entirely unenforceable on the international level, in (potential) contrast to *general* due diligence.

Subsection 1.1.2.1.1 shows that the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 first specified the *general* due diligence rule under international law. Subsection 1.1.2.1.2 explains how the 2015 Paris Agreement further concretised *general* due diligence.

#### 1.1.2.1.1 The UNFCCC concretisation of general due diligence

The UNFCCC reflects due diligence in many ways.

The 1992 UNFCCC aims to stabilise GHGs to safe levels and, thereby, “prevent dangerous anthropogenic interference with the climate system”. At the same time, it recalled that pursuing mitigation measures shall not threaten “food production” and “economic development”, which should “proceed in a sustainable manner”<sup>249</sup>. Preventing risks in light of competing interests is a typical feature of due diligence, which leaves a margin of appreciation to balance those interests while still requiring the minimisation of risks to the lowest point possible<sup>250</sup>.

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249 See the full wording of Article 2 UNFCCC.

250 See 0.2 of the introduction. In addition, see especially ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, Text adopted by the ILC at its fifty-third session in 2001 (A/56/10), Articles 8 – 14 and respective commentaries.

Laying out this balance was the purpose of the UNFCCC, including in terms of its principles and obligations. For instance, the fundamental principles of Article 3 UNFCCC – which remain those currently applicable with the Paris Agreement – specify due diligence in the realm of climate:

- Protection of “the climate system for the benefit of present and future generations of humankind”.
- Precautionary principle: the “lack of full scientific certainty should not be used as a reason for postponing such measures”.
- Equity, “common but differentiated responsibilities and respective capabilities” (CBDR-RC), and “vulnerability” of developing country parties.
- Cost-effectiveness of measures: “ensure global benefits at the lowest possible cost” and no “disproportionate or abnormal burden”.
- Sustainable development, as “economic development is essential for adopting measures to address climate change”.

Hence, the principles above require State parties to take precautionary measures against climate change by sharing the global burden equally among States and without imposing any disproportionate burden. The implementation of those framework principles should enable sustainable economic growth and development (see for precise and authentic wording of Article 3 of the Convention, defining more precisely the implementation of these principles). It is noticeable that Articles 2 and 3 of UNFCCC do not require any impossible change in the conduct of the State parties, but rather some form of action to ensure sustainable growth. On the other hand, the principle of common but differentiated responsibilities and respective capabilities entails the consideration of historical responsibility and the higher capabilities of developed States to frame an equitable burden sharing, which is also in line with due diligence. The combined effect of these principles seems in line with due diligence requirements under general international law and represents an international concretisation of CDD<sup>251</sup>.

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251 Other prominent authors in the legal literature already provided concurring assessments; their opinions are discussed below in subdivision 1.1.2.2: Verheyen R, “Climate Damage and International Law: Prevention Duties and State Responsibilities”, *Martinus Nijhoff*, Leiden, 2005 p 153 and 174–192; Voigt C, “State Responsibility for Climate Change Damages”, (2008) 77 *Nordic Journal of International Law* p 17; Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 13-17; Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) pp 165 – 172.

As to the individual State obligations enshrined in Article 4 UNFCCC, this thesis argues that they also impose due diligence obligations since they make it necessary to identify more precisely the contributing factors to the harm and prevent those:

- Report domestic emissions.
- Implement national climate mitigation measures.
- Develop technologies to control, prevent, and reduce GHG emissions “in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors”.
- Preserve natural carbon sinks (forests and oceans).
- Embed climate change consideration in all “relevant social, economic and environmental policies” through, for example, “impact assessments”.
- “Promote and cooperate in scientific, technological, technical, socio-economic and other research”.

Article 4 (1) (f) even imposes on State parties to consider climate considerations exhaustively in their relevant policies and actions, including by suggesting that it be integrated in environmental impact assessments (EIA)<sup>252</sup>. This is another striking similarity with due diligence, as the ICJ considered that the duty to establish environmental impact assessments is the corollary of due diligence under international customary law<sup>253</sup>.

Article 4 UNFCCC even imposed on developed countries to set out the measures “with the aim of returning individually or jointly to their 1990 levels” before 2000<sup>254</sup>, i.e., by “the end of the present decade” according to Article (4) 2 lit a). According to Prof L Rajamani, quoting Prof Voigt and Prof Mayer, this latter provision lays out a due diligence expectation<sup>255</sup>. Moreover, for Prof Maljean-Dubois, quoting Prof Faure, Nollkaemper and

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252 Article 4 (1) (f)) UNFCCC.

253 *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, arrêt, C.I.J. Recueil 2015, p 665, § 104.

254 Article 4 (1) lit b) in combination with Article (4) 2 lit a) UNFCCC, which mentions the timeframe of “the end of the present decade” according to Article (4) 2 lit a).

255 Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) quoting at footnote 23: Voigt C, “State Responsibility for Climate Change Damages”, (2008) 77 *Nordic Journal of International Law* p 6; see also Mayer B, “Obligations of Conduct in the International Law on Climate Change: A Defence” (2018) 27 *Review of European, Comparative and International Environmental Law (RECIEL)* p 134.

Voigt, it “arguably could be the basis of a liability claim”<sup>256</sup>. Either way, this obligation, whether or not it may constitute a legal basis for liability claim, could only be invoked against The Netherlands under international law. In fact, Article 14 (2) UNFCCC, which provides for a dispute settlement provision by leaving States the ability to recognise through additional declaration the compulsory jurisdiction of the ICJ or other arbitral tribunals, was only recognised by the Netherlands as a developed country. This restricted recognition of the competence of international legal bodies increases the usefulness of looking at alternative bases, such as those related to CDD.

Lastly, one should note that some small island states declared that the UNFCCC does not preclude due diligence’s applicability under international law. More precisely, they claimed that the “ratification of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change as derogating from the principles of general international law”<sup>257</sup>. These declarations marked the beginning of a legal literature debate on the applicability of general international law to climate change, including due diligence.

#### 1.1.2.1.2 The Paris Agreement’s due diligence character

The 2015 Paris Agreement sets out a global objective to “limit the temperature increase to 1.5°C”<sup>258</sup>, concretising thereby the ultimate goal of the 1992 UNFCCC, which is to stabilise GHGs to safe levels. Notably, the goal of the Paris Agreement also mentions different – potentially competing – objectives, being sustainable development and efforts to eradicate poverty<sup>259</sup>. Hence, the climate conventions demand the mitigation of climate change without impeding the economy, which should “proceed in a sustainable manner”. As laid out above in the subsection on the UNFCCC, due dili-

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256 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 17.

257 See the declarations of Nauru, Tuvalu, Kiribati, Fiji, and the Independent State of Papua New Guinea concerning the UNFCCC here: <https://unfccc.int/cop5/resource/docs/cop5/inf02.htm>, last accessed 28 October 2025.

258 Article 2 (1) (a) PA.

259 *Ibid.*

gence – especially in the environmental realm – typically applies in circumstances with different competing objectives (see 0.2 of the introduction<sup>260</sup>).

The Paris Agreement’s specific principles and obligations also reflect due diligence, like the UNFCCC. It recalls the UNFCCC principles and complements them with the principles of progression and “highest possible ambition”. It also imposes individual climate obligations on States, such as the obligation to communicate Nationally Determined Contributions (NDCs), in which States must clearly and transparently set out their mitigation policies and explain how they carry out their best efforts to make a fair contribution to achieve the 1.5°C goal of the Agreement. Article 4 (1) provides that “Parties aim to reach global peaking of greenhouse gas emissions as soon as possible” while recognising that achieving this objective “will take longer for developing countries”. This provision describes a further equity dimension between the global North and South.

Equity is ultimately in line with due diligence as it aims to adequately prevent harm *as soon as* the risks are known (if this is not the case, historical ongoing responsibility may be faced), considering thereby as well the economic level and capacities. Other notable academic authorities asserted concurring positions in this regard.

For instance, Professor Voigt, a law Professor in Oslo, who was the principal legal adviser to the Norwegian delegation during the negotiation and adoption of the Paris Agreement, and who currently co-chairs the implementation and compliance committee of the Paris Agreement and the IUCN<sup>261</sup>, affirmed “that ‘highest possible ambition’ is reflective of a duty of care that states now need to exercise. It implies a due diligence standard”<sup>262</sup>. Note that she already argued in 2008 that customary due diligence requires addressing climate change<sup>263</sup>.

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260 In addition, see especially ILC, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, Text adopted by the ILC at its fifty-third session in 2001 (A/56/10), Articles 8 – 14 and respective commentaries.

261 Voigt C, The power of the Paris Agreement in international climate litigation, RECIEL, 29 June 2023, p 249.

262 Voigt C and Ferreira F, “Dynamic Differentiation: The Principles of CBDRRR, Progression and Highest Possible Ambition in the Paris Agreement”, *Transnational Environmental Law*, 5(2), 2016; Note that Voigt wrote this article with Ferreira, from the Brazilian Ministry of Foreign Affairs, who represented Brazil during the PA’s negotiation on mitigation.

263 Voigt C, “State Responsibility for Climate Change Damages”, (2008) 77 *Nordic Journal of International Law*.

Professor Maljean-Dubois agrees. She is a renowned French scholar regularly publishing on international environmental and climate law, and she quoted Voigt in a 2019 paper to reaffirm that the PA's provisions, especially the principles established in Article 4 (highest possible ambition, progress, CBDRRC) read in combination with the LTTG objective in article 2 imply “a due diligence standard which requires governments to act in proportion to the risk at stake” (Voigt, 2016, 158).<sup>264</sup>

Professor Rajamani also agrees<sup>265</sup>. As a renowned Professor of international environmental and climate law at Oxford, Rajamani is also a “coordinating lead author” for the IPCC<sup>266</sup>, acts as a negotiator in the COP processes for the Alliance of Small Island States, and counselled the Vanuatu government in the advisory opinion it sought before the ICJ. In a collective book on due diligence in the international legal order, Rajamani argued that the Paris Agreement requires exercising due diligence<sup>267</sup>. More precisely, Articles 3 and 4 (1) and (2) of the Paris Agreement pose both *procedural* and *substantive* “due diligence requirements”, being the obligation to communicate NDCs and the implementation of mitigation actions to achieve the core objectives of the UNFCCC and Paris Agreement<sup>268</sup>. Rajamani also concurs with Voigt that the principles of progression, highest possible ambition and CBDRRC correspond to due diligence requirements<sup>269</sup>.

However, if one takes a step back, what is the added value of reading due diligence within the provisions of the Paris Agreement?

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264 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* §17. This article shows – albeit in a brief manner – the different bridges and interconnections between international law, the PA, and domestic and regional law.

265 Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) pp 165 – 172.

266 See IPCC, AR6 (2021-23), WG III, Chapter 14 on International Cooperation.

267 Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) pp 165 – 172.

268 *Ibid*, p 169.

269 *Ibid*.

1.1.2.2 The added value of general due diligence: a legal base linked to preexisting liability systems

As stated in the subdivision above on the UNFCCC, some authors in the legal literature already identified way before this PhD thesis the similarities between the due diligence rule and the UNFCCC provisions, besides the added value of due diligence, namely its customary and enforceable character requiring climate action, independently from adherence to the treaties. According to Verheyen:

“In sum, the no-harm rule is an enforceable primary obligation on States to take measures to mitigate climate change and therefore resembles the obligation identified in Articles 2 and 4.2 FCCC. However, unlike the provisions of the FCCC, the no-harm rule is applicable to all States and allows a distinction only on the level of determining what constitutes proportionate prevention measures. Nevertheless, given the resemblance and the structure and dynamic character of the climate regime, it is necessary to discuss the influence of the regime on the no-harm rule and in particular the due diligence standard. The next section shows that while the rules can stand alone, there are also strong linkages between them.”<sup>270</sup>

Regarding the Paris Agreement, authors unanimously consider that States were unable to agree on something more ambitious and entirely mandatory. For instance, the Brazilian proposal, which combined a mixture of Kyoto Protocol’s provisions for developed country parties and a flexible approach for developing countries akin to the current Paris Agreement regime, was rejected<sup>271</sup>. Maljean-Dubois notes that “(almost) everyone now deem[s] the content of the [Paris] Agreement to be insufficient but in any event both fragile and better than nothing.”<sup>272</sup> Voigt is or was more optimistic and

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270 Verheyen R, “Climate Damage and International Law: Prevention Duties and State Responsibilities”, *Martinus Nijhoff*, Leiden, 2005 p 187.

271 Voigt C and Ferreira F, “Dynamic Differentiation: The Principles of CBDRRR, Progression and Highest Possible Ambition in the Paris Agreement”, *Transnational Environmental Law*, 5(2), 2016 p 292; Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 19-20.

272 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 3.

argued that the Paris Agreement has the “potential to function as a catalyst for a race to the top on climate”<sup>273</sup>.

Rajamani took a more nuanced position in her 2020 analysis: considering the Paris Agreement offers conditions for “constructive ambiguity”<sup>274</sup>, she noted at the same time the danger that State Parties “privilege self-identified benchmarks for ‘progression’, ‘highest possible ambition’, and ‘leadership’, and self-serving narratives concerning the extent to which parties have complied with these”<sup>275</sup>. This kind of critique is recurrent with due diligence, which leaves in principle a significant margin of appreciation. However, for Rajamani, the “enormous risk of potentially irreversible climate impacts at temperatures above 1.5°C suggests a correspondingly high standard of due diligence [...], further bolstering the normative expectation of progression and highest possible ambition placed on parties in relation to their NDCs.”<sup>276</sup> In light of this, what is the added value of due diligence with respect to the “highest possible ambition” principle?

Rajamani admits in her conclusion that “[m]uch will depend on state practice that will emerge in the coming years, and the extent to which states engage in good faith interpretation and application of the standard for due diligence in international climate change law.”<sup>277</sup> In other words, interpreting the Paris Agreement as requiring due diligence does not seem to add any additional substantive expectations to the existing ones, as all ultimately depends on the willingness of States to properly address the climate crisis. Mayer and Van Asselt’s critique concerning the superfluous and – ultimately “unhelpful” – character of due diligence in climate matters resonates here<sup>278</sup>.

While this thesis would tend to side with their nuanced positions, the question remains: what is CDD’s added value, if the Paris Agreement actually already imposes a due diligence standard?

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273 Voigt C and Ferreira F, “Dynamic Differentiation: The Principles of CBDRR, Progression and Highest Possible Ambition in the Paris Agreement”, *Transnational Environmental Law*, 5(2), 2016 p 303.

274 Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) p 170.

275 *Ibid.*

276 *Ibid.*, p 178.

277 *Ibid.*, p 180.

278 Mayer B, “International Advisory Proceedings on Climate Change” (2023) 44 *Michigan Journal of International Law* p 113–114. ; see as well: Mayer B and van Asselt H, “The Rise of International Climate Litigation” (2023) *RECIEL* p 8.

The main advantage of international due diligence is that it provides a basis for legal action, even before the Paris Agreement was adopted<sup>279</sup>. Further, due diligence in general international law and the UNCLOS enabled the international community to request advisory opinions from the ICJ<sup>280</sup> and the ITLOS. The presence of due diligence in other legal systems – or similar terms with corresponding legal functions – enabled other applicants to claim failures to address climate change before other courts of law, such as in *Urgenda*, the German constitutional case, or in *KlimaSeniorinnen* before the Grand Chamber of the ECtHR. Thus, as hypothesised in the introduction, due diligence can provide preexisting “traditional” judicial remedies to address the lack of climate action.

Taking note of the pending climate cases, Voigt argues in one of her 2023 papers that “[t]he Paris Agreement will likely be relevant in many of these and other cases to come, whether directly in disputes about its application or interpretation, or indirectly in informing the interpretation of other international agreements.”<sup>281</sup> Due diligence may, therefore, give the opportunity to courts of law to issue “Paris-aligned” interpretations, meaning integrations of the PA’s provisions in other instruments<sup>282</sup>. This dynamic is also induced by article 31 (3) (c) of The Vienna Convention on the Law of Treaties, which requires, when interpreting treaties, to consider the “context” and “[a]ny relevant rules of international law applicable in the relations between the parties.” Beyond international law, the ECtHR may also consider the doctrines of “living instrument” and “harmonious interpretation”, or simply consider other legal instruments not directly applicable to their cases if the context so requires<sup>283</sup>. Systematic “Paris-aligned” interpretations ultimately avoid *fragmenting* the law and enable the shaping of *consistent* law beyond borders (see in the glossary, the terms

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279 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 19 et seq.

280 See UN General Assembly, “Obligations of States in respect of Climate Change, Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276”, 29 March 2023.

281 Voigt C, “The Power of the Paris Agreement in International Climate Litigation”, *RECIEL*, 2023.

282 *Ibid*, p 243 referring to, among others, Vienna Convention on the law of treaties, article 31 (3) (c).

283 The ECtHR applied the doctrine of the living instrument and harmonious interpretation in preceding cases, such as, for example, to consider the death penalty incompatible with the convention (ECtHR [GC], *Soering v United Kingdom*, no. 14038/88, 07 July 1989, § 102 – 103).

“transnational law” and “global law”), ultimately giving potential rise to “transnational CDD”.

Remarkably, domestic courts also entered into a harmonisation undertaking by considering the Paris Agreement, and for some of them, customary due diligence. For instance, the Dutch District Court in *Urgenda* mentioned the “reflex effect”<sup>284</sup> of international law to justify its consideration when it based its decision on the tort law duty of care, while the Dutch Supreme Court acknowledged that the interpretation of articles 2 and 8 ECHR, which formed the basis of its judgement, entail the consideration of international law, given the corresponding requirements of the Vienna Convention on the Law of Treaties<sup>285</sup>. The German Constitutional Court (BVerfG)<sup>286</sup> considered the Paris Agreement throughout its lengthy opinion to discuss many different aspects, while the British<sup>287</sup> and French Courts in *Grande-Synthe*<sup>288</sup> and *L’affaire du siècle*<sup>289</sup> also did so, albeit more succinctly, to take note of the fact that States recognise their capacity to act and their “common but differentiated responsibilities”. The High Court of London also acknowledged that the UK policies respond to the Paris Agreement in the successful British climate case<sup>290</sup>.

Professor Maljean-Dubois also noted that treaty obligations are generally regularly interpreted in a *harmonious* manner with the customary due diligence rule<sup>291</sup>, by referencing the *South China Sea Arbitration Award*. She also stated that customary due diligence provides the advantage of being actionable before international and domestic courts<sup>292</sup> and allows

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284 Rechtbank Den Haag, C/09/456689 / HA ZA 13-1396, 24 June 2015, 24 June 2015, § 4.43.

285 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 5.4.1 – 5.4.3.

286 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021.

287 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022, § 1 – 5.

288 Supreme Administrative Court, *Grande-Synthe*, n° 427301, 19 November 2020, §12.

289 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 18 – 21.

290 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022, § 1 – 5.

291 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 20.

292 *Ibid.*, § 20 and 46.

it to be interpreted in combination with the Paris LTTG and legislation implementing NDCs. Maljean-Dubois concluded that due diligence will enable courts to intervene domestically and internationally, complementing themselves and thereby creating a “circular continuum”<sup>293</sup>.

Rajamani also agrees since she ended her article on international due diligence in the climate context with a hopeful note by recalling the fact that due diligence may enable holding States “to a high standard of due diligence in the discharge of their obligations of conduct under the climate regime”<sup>294</sup> without excluding the possibility of doing that in a legal forum. Rajamani concluded that “it may trigger an ever-increasing cycle of ambitious action, which could eventually meet the goals of the climate regime.”<sup>295</sup>

The conceptual proximity of the climate conventions with customary due diligence provides even more potential for courts of law to position themselves on the Paris Agreement, even though they do not have any *direct* competence to monitor, enforce (or even reinforce) its application. However, as shown above, international, regional and domestic courts seem willing to consider the Paris Agreement thanks to general due diligence types of legal bases, in order to *indirectly* monitor, enforce or even strengthen it. Ultimately, the ICJ aligned with this trend and interpreted due diligence in light of the climate conventions, and vice versa, in its corresponding advisory opinion<sup>296</sup>.

### 1.1.2.3 The UNFCCC and the Paris Agreement do not derogate due diligence

In addition to the non-applicability of due diligence to climate change, some lawyers, such as Zahar, argue that the climate conventions constitute

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293 *Ibid*, § 46.

294 Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) p 180.

295 *Ibid*.

296 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025.

*lex specialis*, meaning they exclude general law (i.e., *lex specialis derogat legi generali*)<sup>297</sup>.

On the other hand, a majority of recognised legal authors argue that customary due diligence applies to climate change (see just above, notably section 2.1.1) and that international conventions such as the Paris Agreement merely specify customary international law by laying out “a compliance regime”<sup>298</sup>. A line of analysis, with which this thesis agrees, even considers that the climate conventions contain due diligence, or similar principles which reflect due diligence (see section 1.1.3). In any case, conventional and customary rules can coexist without excluding each other<sup>299</sup>.

To settle this dispute, one needs to consider the basic rule on *lex specialis*, notably present in the ILC Commentary on the Draft articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), which states that “[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other”<sup>300</sup>. To claim a contradiction, Zahar endeavoured to show in 2014, before the Paris Agreement’s adoption, inconsistencies between the due diligence rule and the climate regime by arguing that developing countries must not reduce their GHGs under the conventions, whereas due diligence under general international law would require efforts by everyone (if applicable). He noted that the UNFCCC recognises that “economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”, which in his eyes “implicitly affirms the legal right of a ‘sizable number of states to continue to pump out greenhouse gases in ever-increasing quantities”<sup>301</sup>.

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297 Zahar A, “Mediated versus Cumulative Environmental Damage and the International Law Association’s Legal Principles on Climate Change”, *Climate Law*, 4(3–4), 2014.

298 See Mayer B, “Construing International Climate Change Law as a Compliance Regime” (2018) 7(1) *Transnational Environmental Law* p 115–137.

299 ILC, DARSIWA, with commentaries, 2001, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10), Commentary of Article 55 on *lex specialis*, paragraph 2.

300 *Ibid*, Commentary of Article 55 on *lex specialis*, paragraph 4.

301 Zahar A, “Mediated versus Cumulative Environmental Damage and the International Law Association’s Legal Principles on Climate Change”, *Climate Law*, 4(3–4), 2014 p 32.

This PhD argues, in line with other authors (Maljean-Dubois, Voigt, Mayer and others), that the recognition of competing priorities for developing States in the UNFCCC does not rule out a general mitigation duty, or the applicability of *general CDD*<sup>302</sup>. More specifically, the UNFCCC and the Paris Agreement do not exempt the Global South from climate obligations; they only require developed countries to do more than the developing ones and to assist them with regard to funding, capacity building, and technology transfer. And while Article 4 (7) UNFCCC and Article 3 Paris Agreement make *effective* climate action from developing countries dependent on the assistance of the developed countries, it still requires all State Parties to act on mitigation by communicating NDCs and complying with some principles, such as the highest possible ambition and progression (see above, section 1.3.2 on the PA). Thus, it is *indisputable* that the climate conventions require climate mitigation by everyone.

While the climate conventions set out principles to organise the burden-sharing of mitigation and climate finance (equity, CBDRRC, principle of “taking the lead” for Global North countries), they do not contradict the customary due diligence rule. One must remember that due diligence does not expect the same conduct from every State. On the contrary, its concrete requirements depend on individual State capabilities, as seen in the introduction. This flexibility and adaptability are similar to the conventional principles. These core ingredients make CDD compatible with the obligations and expectations of the climate conventions, among which the “common but differentiated responsibilities and respective capabilities” (CBDRRC) principle (see the concurring arguments of Voigt<sup>303</sup>, Maljean-Dubois<sup>304</sup>, and Rajamani<sup>305</sup>).

However, there is to some extent one difference between the climate regime and *general CDD*: the Paris Agreement relies on compliance pro-

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302 See for example, Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law*.

303 Voigt C and Ferreira F, “Dynamic Differentiation: The Principles of CBDRRC, Progression and Highest Possible Ambition in the Paris Agreement”, *Transnational Environmental Law*, 5(2), 2016; Voigt C, “The Power of the Paris Agreement in International Climate Litigation”, *RECIEL*, 2023 p 237 – 249.

304 Maljean-Dubois S, “Climate Change Litigation” (2019) *Max Planck Encyclopedia of Procedural Law* § 17.

305 Rajamani L, “Due Diligence in International Climate Change Law” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) pp 165 – 172.

visions which are “non-adversarial and non-punitive”<sup>306</sup>, whereas, due diligence, on the other hand, is a standard legal basis which can be claimed in contentious cases. These differences do not make these regimes entirely incompatible, but rather complementary. Indeed, conventional law rather focuses on cooperation and transparency, whereas general international law offers the availability of judicial remedies. Either way, the climate conventions also provide for compromissory clauses, which can also lead to the application of customary due diligence read in harmony with the conventions.

Thus, the conventional system does not rule out *general* due diligence, an opinion that the ICJ and ITLOS confirmed in their recent advisory opinions<sup>307</sup>.

### 1.1.3 CDD, towards jus cogens?

In the 2015 article, Mayer even questioned whether the prevention principle may be considered as *jus cogens*, meaning international “overriding” or “peremptory” norms, rendering any opposition or even “persistent objections” by States inadmissible, since its observation is necessary to sustain peace and life on earth<sup>308</sup>.

If this were to be, the *lex specialis* argument could not work as any rule conflicting with a peremptory norm is void according to Article 53 of the 1969 Vienna Convention, and the ILC commentary of the DARSIIWA<sup>309</sup>. It would also render any plea of “necessity” against climate action impossible<sup>310</sup>.

However, to be recognised as peremptory, “the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having

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306 Article 15 (2) PA.

307 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 224 - 229; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 165 – 171.

308 Mayer B, “The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar” (2015) 5 *Climate Law*.

309 DARSIIWA, Article 26, commentary.

310 DARSIIWA, Article 26, commentary, § 4.

a peremptory character by the international community of States as a whole.”<sup>311</sup> Does due diligence, and especially CDD, fulfil these criteria?

While Mayer eventually responded negatively to this question in 2015, a 2023 study commissioned by the European Parliament took a different view<sup>312</sup>: if the *substantive* due diligence obligation is somewhat irreconcilable with the concept of a peremptory norm<sup>313</sup>, as it allows for the balancing of conflicting interests, the study considers that the *procedural* due diligence contained within the Paris Agreement and customary international law may fulfil this definition. This includes the duty to “maintain and enhance over time ambitious domestic climate goals, as well as the duty to “meaningfully cooperate at the international level in a transparent way.”<sup>314</sup> This PhD thesis does not label those obligations as proper *procedural* obligations, as they rather constitute *substantive* obligations of conduct with some degree of appreciation. Hence, the required underpinning legal consciousness for establishing systemic mitigation due diligence as *jus cogens* may already be present.

One may ask whether it could also be the case for the substantive dimension, as the climate situation worsens further and may soon overstep the 1.5°C threshold. Shaping a CDD 1.5°C mitigation duty into a full *jus cogens* obligation may, however, be difficult in light of the other equally important and competing interests (development, job security, energy security, and financial stability). In addition, some use of fossil fuels and other products emitting GHGs is still necessary, meaning that States must still strike an appropriate balance between fossil fuels and low-carbon energies.

However, the “climate emergency or urgency findings by the COP<sup>315</sup> and in the preamble of the Paris Agreement<sup>316</sup> should require prioritising mitigation to the most feasible extent: States have to achieve their “highest possible ambition”. The latest COP 28 decision specified what it considers prioritising mitigation to be, and called for “transitioning away from fossil fuels” while not demanding the same conduct from each actor in each

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311 DARSIVA, Article 26, commentary, § 5, referring to Article 53 of the Vienna Convention.

312 Brus M and others, *The Normative Status of Climate Change Obligations under International Law* (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate-General for Internal Policies, September 2023).

313 *Ibid.*

314 *Ibid.*, p 9.

315 COP 28 decision, § 5.

316 PA preamble, § 4.

circumstance<sup>317</sup>. All of these developments point to gradual, but firm and steady, reinforcement of mitigation actions, perhaps ultimately turning the substantive CDD into a gradual *jus cogens* norm.

Thus, while CDD cannot necessarily achieve a strict *jus cogens* status in its substantive form due to the existence of strong competing interests, the universal character of CDD may make it an obligation close to *jus cogens*, being at least an *erga omnes* obligation given that they “are the concern of all States”<sup>318</sup>. It is worth noting that the Inter-American Court of Human Rights ruled in 2025 that there is indeed a general *jus cogens* obligation not to cause “irreversible damage to the ecosystems that sustain life”<sup>319</sup>, while the ICJ considered that CDD, including the duty to limit global warming to 1.5°C, has an *erga omnes* character<sup>320</sup>. Although these findings are somewhat different, they are actually consistent in that the IACtHR determination is on a higher level than that of the ICJ. The former considered all the environmental issues that can imperil life on Earth, while the latter focused on more specific climate-related obligations, including CDD and the mitigation duty to limit warming to 1.5°C.

#### 1.1.4 Provisional conclusion on the existence of international CDD

This section demonstrated the existence of international CDD.

The basic due diligence obligation requires States to prevent transboundary harm if an activity is dangerous. There was an important debate – and, there is still one, to some extent – to know whether or not States must prevent climate change on the basis of general customary law since GHGs do not *directly* cause dangerous impacts or “transboundary” harm. However, climate change becomes dangerous only in the (current) context

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317 COP 28, “First Global Stocktake (United Arab Emirates)”, *FCCC/PA/CMA/2023/L.17*, 13 December 2023, § 28; for a commentary, see Van Asselt Harro, “Historic or ‘Historic Failure’? Fossil Fuels at COP28”, *EJIL: Talk!*, 2023.

318 See, the rather concurring opinions of the ILC and Judge Serghides of the ECtHR: ILC, Draft Guidelines on the Protection of the Atmosphere, with commentaries, A/76/10, 2021, Guideline 3, Commentary § 5 (Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10); ECtHR, *Pavlov and others v Russia*, no. 31612/09, 11 October 2022, concurring opinion of Judge Serghides, § 17.

319 Inter American Court of Human Rights, Climate Emergency And Human Rights, Advisory Opinion AO-32/25, 29 May 2025, § 287 – 294.

320 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 439 – 443.

of the *accumulation* of anthropogenic GHGs in the atmosphere (i.e., it is a cumulative harm). This specificity challenges the traditional criteria concerning the applicability of due diligence. Zahar thus argued that customary international law does not require the mitigation of global warming<sup>321</sup>.

However, this dissertation found consensual and legally authoritative elements showing that the collective, cumulative, diffuse and global nature of climate change are not insurmountable obstacles to establishing the applicability of general due diligence to climate change, evidenced notably by the no-harm principle in the UNFCCC preamble, declarations of individual States<sup>322</sup>, judicial findings<sup>323</sup>, the 2021 ILC on report on the protection of the atmosphere<sup>324</sup>, and more recently, the ITLOS advisory opinion<sup>325</sup>.

Moreover, the due diligence duty is manifestly applicable for the following factual and scientific reasons: States *can* reduce their GHGs as they have jurisdiction over their GHGs (whether territorial or not), including by cooperating with others. Furthermore, climate-related impacts are the *physical* result of *man-made* GHGs, which cumulatively cause climate change. While global warming is not localised damage, it still represents serious and significant risks of loss and damages, for numerous legally protected

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- 321 Zahar A, “Mediated versus Cumulative Environmental Damage and the International Law Association’s Legal Principles on Climate Change”, *Climate Law*, 4(3–4), 2014; Mayer B, “The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar” (2015) 5 *Climate Law*.
- 322 See the declarations of Nauru, Tuvalu, Kiribati, Fiji, Independent State of Papua New Guinea concerning the UNFCCC here: <https://unfccc.int/cop5/resource/docs/cop5/inf02.htm>, last accessed 28 October 2025.
- 323 SCOTUS, *Massachusetts et al v EPA*, opinion of the Court, 549 U. S. \_\_\_\_ (2007), p 20; Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 4.6 and § 5.7.5; Supreme Administrative Court, *Grande-Synthe*, n° 427301, 19 November 2020 § 12; Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 21; Constitutional Court of Germany (*Bundesverfassungsgericht*), 1 BvR 2656/18, 24 March 2021, headnotes 1 and 2; Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, *Daniel Billy et al v Australia*, CCPR/C/135/D/3624/2019, 22 September 2022, § 7.8 and 8.3. CRC, *Sacchi et al v Argentina et al*, Decision concerning France, CRC/C/88/D/106/2019, 8 October 2021
- 324 ILC, Draft Guidelines on the Protection of the Atmosphere, with commentaries, A/76/10, Guidelines 1 in combination with 3 (Official Records of the General Assembly, Seventy-six Session, Supplement No. 10).
- 325 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 224.

interests, including under international law, as notably evidenced by the latest IPCC reports<sup>326</sup>.

The cumulative dimension means that every person engages in a dangerous activity, as climate mitigation is a polycentric issue<sup>327</sup>. This collective dimension does not alleviate the responsibility of “systemic” actors, such as States and large companies, as the need to address the issue at all levels remains<sup>328</sup>. Consequently, all actors must do their share, even more so as systemic actors: States must regulate private persons, and large corporations must pursue all reasonable mitigation measures proactively, even in the absence of adequate regulation.

This set of facts fulfils the criteria for applicability of due diligence in the realm of climate change, among others, those set out by the ILC in its Article 1 of the Draft Articles on Prevention of Transboundary Harm. The opposite would mean that no *general* law governs climate change, a dangerous implication as such, because each State would have unlimited freedom in this respect if it were no longer bound by the climate regime. The consequence is that States must carry out their best efforts to tackle climate change mitigation by doing their part, meaning – among others – to implement effective, reasonable, updated, and appropriate measures, independently of the existence of specific climate treaties.

Furthermore, the climate regime (UNFCCC, Kyoto Protocol, Paris Agreement) does not constitute *lex specialis* since it also contains norms and principles similar to due diligence<sup>329</sup>. Indeed, the principles of highest possible ambition, common but differentiated responsibilities and respective capabilities, and the duty to set up a framework and specific mitigation measures require conduct corresponding to CDD. The climate regime merely sets out global climate goals (such as the 1.5°C goal of the Paris Agreement), general duties and principles which specify to some extent the general due diligence expectations. These climate conventions, one may argue, are the result of the collective global due diligence duty to

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326 IPCC, AR 6 (2021-23), SYR; IPCC, SRI.5 (2018), SPM.

327 Ostrom E, “A Polycentric Approach for Coping with Climate Change”, Background Paper to the 2010 *World Development Report*, Policy Research Working Paper 5095, 2009.

328 See, among others, IEA, “Net Zero by 2050: A Roadmap for the Global Energy Sector”, 2021.

329 ILC, DARSIIWA, with commentaries, 2001, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10), Commentary of Article 55 on *lex specialis*, paragraph 2.

cooperate. Notable legal authors who also took part in the negotiations of the treaties share this view<sup>330</sup>. Lastly, as seen in the introduction (section 0.2), general due diligence is regularly used as a standard to interpret international treaties. Thus, given the presence of due diligence in the climate conventions and their similarities with the requirements under customary international law, the climate conventions do not derogate *general CDD*, as confirmed by the ICJ and ITLOS<sup>331</sup>.

The *second* consequence of the applicability of general CDD is the potential competence of courts of law (including international ones) to adjudicate the failure to comply with general CDD<sup>332</sup>. The courts' jurisdiction is a significant added value compared to the climate conventions, which either do not provide for judicial remedies (Paris Agreement) or whose dispute settlement provisions are not accepted by States<sup>333</sup> (UNFCCC, Article 14).

Last but not least, the mitigation of global warming may constitute *jus cogens*, at least in its *procedural* dimension (i.e. measuring the risks, recognizing its ability to tackle the problem, setting a relevant framework, demonstrating publicly that one is implementing one's best efforts) due to the universal recognition of CDD and the climate regime on one hand (except, perhaps by the USA), and the scale and gravity of the problem on the other<sup>334</sup>.

## 1.2 Human rights applicable to climate change

Since customary international law requires protection against climate change, including by exercising due diligence, and since human rights are

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330 Voigt C and Ferreira F, "Dynamic Differentiation: The Principles of CBDRR, Progression and Highest Possible Ambition in the Paris Agreement", *Transnational Environmental Law*, 5(2), 2016; see as well, Maljean-Dubois S, "Climate Change Litigation" (2019) *Max Planck Encyclopedia of Procedural Law*.

331 ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, § 224; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 165 – 171.

332 Maljean-Dubois S, "Climate Change Litigation" (2019) *Max Planck Encyclopedia of Procedural Law* § 46.

333 *Ibid.*, § 29.

334 Brus M and others, *The Normative Status of Climate Change Obligations under International Law* (European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, September 2023) 9; ECtHR, *Pavlov and others v Russia*, no. 31612/09, 11 October 2022, concurring opinion of Judge Serghides, § 17.

endangered by global warming, the reasoning to find CDD should apply *mutatis mutandis* in the field of human rights law. Section 1.2.1 confirms the validity of the reasoning by analogy by showing that numerous authoritative bodies endorsed the view that international human rights law requires CDD. Section 1.2.2 then shows that this level of agreement also concerns the European human rights system.

### 1.2.1 International human rights law requiring CDD

Subsection 1.2.1.1 establishes the widely shared understanding that international human rights law requires States to exercise due diligence to comply with their duties to protect. Subsequently, subsection 1.2.1.2 points to the different authorities having unanimously recognised that climate change endangers human rights protection. Ultimately, subsection 1.2.1.3 quickly references the regulatory implications of the State's duty to protect.

#### 1.2.1.1 A core due diligence requirement to protect human rights

As in many other international legal branches, including customary international law, the core duty in the international human rights protection system is one of due diligence (a duty to protect or a positive obligation), requiring regulations to ensure private actors do not harm human rights<sup>335</sup>. The Human Rights Committee's (HRC) general comment n°31 on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", adopted in 2004, clearly explains the main requirements and criteria of this general obligation:

"The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities

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335 Krieger Heike, Anne Peters, and Leonhard Kreuzer, *Due Diligence in the International Legal Order*, Oxford University Press (2020), p 389 DOI: 10.1093/oso/9780198869900.003.0021.

that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law."<sup>336</sup>

The HRC specified in the subsequent general comment n°36 on the right to life that due diligence is required when the conduct is *not attributable* to States but still entails a foreseeable threat to the right to life<sup>337</sup> (see, for more details, the section on causation and attribution, section 2.2.2). In such cases, States must still adopt *reasonable* measures to prevent harm "that do not impose disproportionate burdens on them"<sup>338</sup>.

More generally, a contribution to a collective book focusing on due diligence found that due diligence is generally required to prevent all kinds of human rights violations, because of the nature of the obligation, which requires positive action "without having to guarantee success"<sup>339</sup>.

On the regional human rights level, the principle of due diligence is equally well established<sup>340</sup>. The Inter-American Court of Human Rights noted that "the precautionary approach is an integral part of the general

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336 Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev.1/Add. 13, 29 March 2004, § 8.

337 Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 7.

338 *Ibid.*, § 21.

339 Baade B, "Due Diligence and the Duty to Protect Human Rights" in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

340 *Ibid.*; see as well Tran H, "Les obligations de vigilance des États parties à la Convention européenne des droits de l'homme", *Bruylant*, 2013.

obligation of due diligence.”<sup>341</sup> The ECtHR also mentioned due diligence as a standard to discharge the positive obligation to protect human rights, especially in environmental-related cases (see just below the section 1.2.2 on the ECHR).

The above shows the intricate links of the due diligence concept in the human rights field with that applicable in general international law, as notably laid out by the ILC’s Draft articles on Prevention of Transboundary Harm from Hazardous Activities (see also sections 0.2.1 and 0.2.2 of the introduction). Again, this development of human rights law is driven by one simple but significant concept, the need to avoid harm, which gives rise to numerous dynamic developments.

Additionally, since this dissertation already found that customary due diligence under international law applies to climate change, the same conclusion seems valid under human rights law, given that global warming also endangers human rights (see below).

### 1.2.1.2 Human rights endangered by climate change

Numerous UN bodies recognise that climate change is harming human rights. For instance, the Human Rights Committee (HRC) stated in the already quoted general comment n°36 that “climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>342</sup> The HRC did so by notably quoting the UNFCCC preamble<sup>343</sup>.

Five other UN-Human Rights Treaty Bodies (HRTB or “treaty bodies”) reinforced the HRC by stating that the Special Report of the IPCC on the consequences of global warming above 1.5°C “confirms that climate change poses significant risks to the enjoyment of the human rights”. The five committees went on and asserted that global warming harms all of the rights that their respective conventions aim to protect, including “the right to adequate food, the right to adequate housing, the right to health,

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341 See IACtHR, *Velasquez Rodriguez v Honduras*, Judgment (Merits), 29 July 1988, § 172.

342 Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 62.

343 *Ibid.*

the right to water and cultural rights.”<sup>344</sup> The fact that the environment (i.e., the climate) is altered as a preceding condition, which in turn affects human rights, does not pose a problem in terms of causation in the views of the Committees.<sup>345</sup> They further underlined, like the IPCC, that the human rights impacts increase with vulnerabilities, disabilities and other specific conditions and that they “are already occurring at 1°C of warming and every additional increase in temperatures will further undermine the realization of rights”<sup>346</sup>.

On its side, the UN General Assembly (UNGA) adopted a resolution in 2022 which recognised the right to a clean, healthy and sustainable environment as a human right, in addition to finding that climate change interferes with the latter<sup>347</sup>.

The ICJ also confirmed in its advisory opinion on climate change that human rights law requires climate action<sup>348</sup> and consistent actions with international climate law<sup>349</sup>.

This doctoral thesis concurs with those authoritative sources. Even Mayer, who published a long article on the restricted applicability of human rights norms to climate change because of the negative impacts of climate mitigation on human rights themselves (i.e., see his theory of narrow window of applicability), admits that global warming, as such, infringes on individual human rights<sup>350</sup>. Thus, it seems established beyond any reasonable doubt that States must protect humans from climate change.

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344 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

345 *Ibid.*

346 *Ibid.*

347 UNGA, “The Human Right to a Clean, Healthy and Sustainable Environment”, 28 July 2022.

348 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 369 – 386.

349 *Ibid.*, § 403 – 404.

350 Mayer considers the narrow windows of applicability (see Mayer B, “Climate Change Mitigation as an Obligation under Human Rights Treaties?” (2021) 115(3) *American Journal of International Law* p 415.

1.2.1.3 States' duty to protect humans from climate change, including by regulating transnational corporations and value chains

To comply with their human rights-related duties, States must (i) protect the environment and (ii) regulate private actors, including transnational corporations, in this field.

Concerning the need to protect the environment (i), States must give due regard to the implementation of international and domestic environmental law to ensure the right to life is adequately protected<sup>351</sup>. What precedes means that States have to comply with the obligations set out in the Paris Agreement, but also *customary* due diligence in general<sup>352</sup>. Moreover, the already-mentioned joint opinions of five treaty bodies consider that States must “realize the objectives of the Paris Agreement” with respect to mitigation, adaptation, and financial flows to protect human rights, while explicitly noting the extraterritorial dimension of this requirement<sup>353</sup>. The UN General Assembly echoes the preceding positions by asserting that the State’s duty to protect human rights “requires the full implementation of the multilateral environmental agreements”<sup>354</sup>. As mentioned in the introduction (subsection 0.3.2), this systemic integration or harmonious interpretation ultimately aims to make the achievement of the Paris Agreement more likely, or at least avoid undermining its relevance<sup>355</sup>.

Regarding the need to regulate multinational corporations (ii), the Committee on Economic, Social and Cultural Rights (CESCR) stated in its 2017 General Comment n°24 that human rights protection has an extraterritorial reach, notably due to the customary due diligence obligation<sup>356</sup>. The CESCR stated that “the imposition of such due diligence obligations [on multinational corporations...] does not imply the exercise of extraterritorial

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351 Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 62.

352 *Ibid.*, § 62.

353 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

354 UNGA, “The human right to a clean, healthy and sustainable environment”, 28 July 2022.

355 See, among others, the following concurring opinion: Voigt C, “The Power of the Paris Agreement in International Climate Litigation”, *RECIEL*, 2023 p 237 – 249.

356 Committee on the Economic, Social and Cultural Rights, General Comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, § 27.

jurisdiction by the States concerned”, meaning the extraterritorial reach of the due diligence obligation is compatible with the principles of State sovereignty<sup>357</sup>. Indeed, as long as there is a lawful and legitimate territorial basis for jurisdiction, States can regulate certain matters, even if they have an extraterritorial dimension, such as when “a) the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-state actor’s activities are carried out in that State’s territory”<sup>358</sup>. The CESCR further argued that this extraterritorial obligation is aimed at protecting third-states and their respective individuals, in conformity with the due diligence principles of customary international law, and Articles 55 and 56 of the UN Charter, which require all Member States to take action to achieve “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”<sup>359</sup>. These findings ultimately led the CESCR to issue this general extraterritorial State obligation from the moment a “State party may influence situations located outside its territory, consistent with the limits imposed by international law”<sup>360</sup>.

According to General Comment n°36 of the Human Rights Committee (HRC), this general duty to regulate transnational corporations is applicable in the climate field. The HRC also explained in its General Comment n°36 that the due diligence duty requires regulating corporations and their transnational activities by referencing the UN Guiding Principles on Business and Human Rights (UNGPs), addressed in subsection 0.2.2 of the

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357 *Ibid*, § 33.

358 De Schutter O et al, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (2012) 34 *Human Rights Quarterly* p 1084–1169.

359 Committee on the Economic, Social and Cultural Rights, General Comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, § 27.

360 *Ibid*, § 28.

introduction<sup>361</sup>. The five other UN treaty bodies also directly confirmed this obligation by pointing to the HRDD concept<sup>362</sup>.

Moreover, courts of law monitoring the implementation of human rights, such as domestic courts and the ECtHR (i.e., the UN treaty bodies do not have enforcement powers<sup>363</sup>), could follow these interpretations, notably in light of the concept of harmonious interpretation and systemic integration<sup>364</sup>.

## 1.2.2 European human rights law applicable to climate change

The ECtHR judgements are particularly important since the Court's judgements are binding<sup>365</sup>, and since domestic courts in the European sphere have the duty to monitor the implementation of the Convention<sup>366</sup>. And while the ECtHR found that Article 8 requires climate mitigation in *KlimaSeniorinnen*, it remains important to succinctly explain the main underlying reasons leading to this decision.

For this purpose, subsection 1.2.2.1 notes the existence of due diligence as a concept, especially in the environmental field. Subsection 1.2.2.2 then discusses its applicability in the climate realm.

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361 Human Rights Committee, General Comment n°36, CCPR/C/GC/36, 3 September 2019, § 22.

362 Five UN human rights treaty bodies, Joint Statement on “Human Rights and Climate Change”, *op cit*, 16 September 2019.

363 The UN HRTB are not judicial bodies in the strict sense of the term, as the additional protocols to the various international conventions do not provide them with enforcement powers; still, they recognise their ability to interpret the conventions, and also to provide “views” by deciding individual cases (See, for example, art. 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, 23 March 1976). This thesis addresses enforceability in Part 2.

364 See articles 31 to 33 of the Vienna Convention on the Law of Treaties, applied by the ECHR, ICJ and ITLOS. The harmonious interpretation of the Convention with norms of international law is particularly relevant in cases dealing with the environment, as this is a global issue that concerns the entire international community.

365 See Article 46 ECHR.

366 ECtHR, *Grzęda v Poland* [GC], 2022, § 324.

1.2.2.1 General due diligence requirement to protect human rights,  
including in environmental-related cases

Although the ECtHR did not often use the term “due diligence” until recently, the concept was already embedded in its jurisprudence<sup>367</sup>. The ECtHR 1998 judgement in *Osman v United Kingdom* notably shows it was the pertinent standard to assess compliance with the Convention. In this case, the Court laid out that the State needs to take all reasonable measures to prevent foreseeable risk to human rights, including if the threat is generated by a private person, and stated that more restrictive standards of gross negligence or wilful disregard are not compatible with the Convention<sup>368</sup>. As usual, a breach finding with due diligence depends on the actual circumstances of the case, requiring an analysis *in concreto*<sup>369</sup>. All these properties equate to those of due diligence described in the introduction.

In subsequent prominent environmental cases, the ECtHR used the term due diligence explicitly. For instance, in the 2005 *Fadeyeva v Russia* case, the Court held in relation to the duty to regulate private industry that:

“it is not the Court’s task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly within the Court’s jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interest. In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.”<sup>370</sup>

In other words, although the due diligence standard provides States with a so-called “margin of appreciation”, they still need to show that they adequately regulated the industry to ultimately curb the pollution. Thereby, the Court somehow reversed the burden of proof to oversee compliance<sup>371</sup>.

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367 See concurring opinions : Tran H, “Les obligations de vigilance des États parties à la Convention européenne des droits de l’homme”, *Bruylant*, 2013; Baade B, “Due Diligence and the Duty to Protect Human Rights” in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

368 ECtHR, *Osman v United Kingdom*, 87/1997/871/1083, 28 October 1998, §116.

369 *Ibid.*

370 ECtHR, *Fadeyeva v Russia*, no. 55723/00, 30 November 2005, § 128 – 129.

371 *Ibid.*

In the more recent environmental cases of *Cordella et al v Italy*<sup>372</sup> and *Pavlov and others v Russia*<sup>373</sup>, the ECtHR restated its approach laid out in *Fadeyeva*, which aims to assess whether the respondent State approached the issue with due diligence. This position confirms the view that due diligence is a standard of conduct against which courts can measure compliance. Moreover, in *Pavlov*, the Court added that while the duty to take reasonable and appropriate measures may leave some leeway to the States in finding the right balance between conflicting interests, it specified that this balancing exercise is subject to the judicial review of the Court<sup>374</sup>. In the same vein, the ECtHR recognised in *Tatar v Romania* that Article 8 implies “the primary duty to establish a legislative framework and administrative measures for the effective prevention of damage to the environment and human health”<sup>375</sup>. Furthermore, States have a duty to conduct environmental assessments to properly assess the environmental danger, and to disclose the results of those studies<sup>376</sup>, even in the presence of scientifically uncertain elements (i.e., recognition of the precautionary principle)<sup>377</sup>.

Almost all of those criteria equate to the due diligence criteria under customary international law (see subparts 1.1 just above and 0.2 of the introduction).

### 1.2.2.2 The applicable ECHR in the climate realm

Since the analysis above confirms that due diligence applies to climate change under international law, the same conclusion seems valid under human rights law, given that global warming endangers human rights and that the positive obligations of States to protect human rights also encompass due diligence. The following authorities confirm this opinion.

A number of domestic cases also established the applicability of the Convention to climate matters. They either directly based themselves on Articles 2 and 8 of the Convention (Dutch and Belgian courts) or deemed

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372 ECtHR, *Cordella et al v Italy*, 54414/13 and 54264/15, January 24, 2019, § 161.

373 ECtHR, *Pavlov and others v Russia*, no. 31612/09, 11 October 2022, § 90.

374 *Ibid*, § 75.

375 ECtHR, *Tatar v Romania*, 67021/01, 6 July 2009, § 88; also referring to *Budayeva v Russia*, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, §§ 129-132, 20 March 2008.

376 ECtHR, *Tatar v Romania*, 67021/01, 6 July 2009, § 114; see as well, ECtHR, *Ockan v Turkey*, 46771/99, 28 March 2006, § 43

377 ECtHR, *Tatar v Romania*, 67021/01, 6 July 2009, § 120.

them relevant in the development of their opinion (see, for example, the German Constitutional Court's decision<sup>378</sup>). They also relied on due diligence types of norms, which are also present in the Convention system, such as the "duty of care" in *Urgenda* ("*zorgplicht*")<sup>379</sup>, the "special duty of care" in the German constitutional case ("*besondere Sorgfaltspflicht*")<sup>380</sup>, and the "*devoir de prudence et de diligence*" from Articles 1382 and 1383 of the Belgium Civil code in the *Klimatzaak* case<sup>381</sup>.

The "Strasbourg Principles of International Environmental Human Rights Law"<sup>382</sup>, elaborated by some judges of the Court<sup>383</sup>, also previously pointed to the applicability of the Convention – including the embedded due diligence notion – in climate matters<sup>384</sup>.

Thus, in light of these elements, and besides the fact that the living instrument doctrine and the principle of harmonious interpretation applied by the Court previously enabled the incremental development of the Court's jurisprudence in the environmental area, as the former President Spano recalled<sup>385</sup>, the ECtHR found itself in a position in which it was almost constrained to confirm the applicability of the Convention to climate change.

378 Constitutional Court of Germany (*Bundesverfassungsgericht*), 1 BvR 2656/18, 24 March 2021, Headline 3 and § 237; see as well § 99 for its applicability with respect to the ECHR.

379 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019.

380 Constitutional Court of Germany, 1 BvR 2656/18, 24 March 2021, Headline 3 and § 237; see as well § 99 for its applicability with respect to the ECHR.

381 Court of First Instance of Brussels (French-speaking), *Klimaatzaak*, 2015/4585/A, 17 June 2021, p 58 and 83.

382 "The Strasbourg Principles of International Environmental Human Rights Law – 2022" (2022) 13 *Journal of Human Rights and the Environment* (special issue) p 196.

383 These Principles were drafted by a group of human rights and environmental law experts who were brought together by the "Human Rights for the Planet" conference held in 2020 at the European Court of Human Rights in Strasbourg and by the said Special Issue of the *Journal of Human Rights and the Environment*. According to the editorial, the conference "gathered renowned practitioners and academic experts in the field of international environmental law and human rights; the UN High Commissioner for Human Rights; the Secretary General of the Council of Europe; the ECtHR's Presidents and judges; ambassadors".

384 "The Strasbourg Principles of International Environmental Human Rights Law – 2022" (2022) 13 *Journal of Human Rights and the Environment* (special issue) principles 34, 39 and 40.

385 Spano Robert, "Should the European Court of Human Rights Become Europe's Environmental and Climate Change Court?", *Conference on Human Rights for the Planet*, Strasbourg, 5 October 2020.

And this is what eventually happened on 9 April 2024, when the Grand Chamber of the Court eventually confirmed the applicability of the positive obligations of the Convention to climate change in *KlimaSeniorinnen v Switzerland* because of the threats to human rights posed by exceeding the 1.5°C target<sup>386</sup>. The Court further found resulting duties to regulate GHG emissions as expressed in the following statement:

“Accordingly, the State’s obligation under Article 8 is to do its part to ensure such protection. In this context, the State’s primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, as noted in paragraphs 435 and 519 above, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory.”<sup>387</sup>

This decision will likely produce further horizontal effects between private parties as well, since general tort law covers some interests protected by human rights law, as already evidenced in the Hague Court of Appeal’s judgement in *Shell*<sup>388</sup>. Additionally, this primary duty extends, in principle, to extraterritorial emissions, as the ECtHR also alluded to it<sup>389</sup>. Moreover, the Court declared that Switzerland notably violated its positive obligation to protect Article 8<sup>390</sup>. One cannot exclude the possibility that the ECtHR will find further violations by other States in other cases.

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386 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 436 ; 451 ; and § 558.

387 *Ibid.*, § 545 et seq.

388 Court of Appeal of The Hague, *Milieudefensie v Shell*, C/09/571932 / HA ZA 19-379, 12 November 2024, § 7.18; see as well: Van Asselt H and Savaresi A, “Corporate Climate (Un)Accountability? Landmark Shell Ruling Overturned on Appeal”, *Centre for Climate Engagement, Hughes Hall, University of Cambridge*, 13 November 2024.

389 ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, § 287, and the partly concurring partly dissenting individual opinion of Judge Eicke, § 5.

390 *Ibid.*, § 657.

### 1.2.3 Provisional conclusion on the existence of human rights CDD

After having established the existence of CDD in customary international law (subpart 1.1), this subpart found that it is possible to find the existence of climate mitigation due diligence duties by analogy due to the following factors:

- Human rights protection, whether international or regional, requires due diligence<sup>391</sup>. Especially, when States comply with their obligations to protect human rights or their positive duties, they must act with due diligence. This notion is explicitly used by both the UN treaty bodies and the ECtHR.
- Climate change represents significant risks of harm in the context of human rights, as confirmed by the IPCC reports and UN treaty bodies<sup>392</sup>.
- Combining these findings enables a syllogistic conclusion that the State's human rights due diligence obligations require climate mitigation, as determined by UN treaty bodies and the ECtHR<sup>393</sup>. Those decisions extend, in principle, to extraterritorial emissions<sup>394</sup> and will likely produce further horizontal effects between private parties as well, as already evidenced by the latest Hague Court of Appeal's judgement in *Shell*<sup>395</sup>.

Given the multi-level protection of human rights and their universal aspiration, CDD has an even more ubiquitous or universal character.

### 1.3 Domestic general due diligence applicable to climate change

This subpart assesses the existence of CDD in domestic comparative tort law.

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391 See, among others, Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev.1/Add. 13, 29 March 2004, § 8; ECtHR, *Fadeyeva v Russia*, no. 55723/00, 30 November 2005, § 128 – 129.

392 See, among others, Five UN human rights treaty bodies, Joint Statement on "Human Rights and Climate Change", *op cit*, 16 September 2019; ECtHR, *KlimaSeniorinnen et al v Switzerland*, no. 53600/20, 9 April 2024, see notably § 436.

393 *Ibid.*

394 *Ibid.*, § 287; See as well, the opinion of partly concurring partly dissenting opinion of Judge Eicke, § 5.

395 Court of Appeal of The Hague, *Milieudéfensie v Shell*, C/09/571932 / HA ZA 19-379, 12 November 2024, § 7.18; see as well: Van Asselt H and Savaresi A, "Corporate Climate (Un)Accountability? Landmark Shell Ruling Overturned on Appeal", *Centre for Climate Engagement, Hughes Hall, University of Cambridge*, 13 November 2024.

As this thesis has indicated multiple times, Dutch courts established and consolidated CDD in their domestic private law in the *Urgenda* proceedings. A first-instance court in The Hague even replicated a similar finding against a parent company of a large multinational oil and gas group in *Milieudefensie v Shell*. Does CDD also exist in the domestic tort laws of the French, German and common-law jurisdictions?

Before assessing CDD's existence in those legal systems, section 1.3.1 briefly recalls the origins and main developments of CDD under Dutch law, as some common origins and similar features exist with the other developed countries' liability systems. Then, section 1.3.2 articulates in much more detail the applicability of general due diligence to climate change in France<sup>396</sup>, whereas section 1.3.3 addresses CDD in Germany, and, finally, section 1.3.4 focuses on common law jurisdictions.

### 1.3.1 CDD's existence in Dutch law (overview)

As with any other European tort law, Dutch tort law stems from Roman law, as well as Germanic tribal law, Grotius' writings, and the Napoleonic Code<sup>397</sup>.

Over the course of the 20<sup>th</sup> century, the Dutch Supreme Court elaborated on the fundamental principles and criteria of its modern duty of care, notably in the *Kelderluik* (1965) case law<sup>398</sup>, a classic day-to-day accident case involving one individual wrongdoer and a victim. In 2015, the first instance court in The Hague ruled in the *Urgenda* case that this doctrine of hazardous negligence was relevant to dealing with climate change and adapted the criteria accordingly:

“Understandably, the State has pointed out the relevant differences between this jurisprudence and this case. This case is different in that the central focus is on dealing with a hazardous global development, of which it is uncertain when, where and to what extent exactly this hazard will materialise. Nevertheless, the doctrine of hazardous negligence, as explained in the literature, bears a resemblance to the theme

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396 Note that the term “common law” may refer in this thesis to the respective “general tort liability laws” of the assessed domestic jurisdictions.

397 Warden Lee R and Cowen D V, “Roman-Dutch Law”, *Encyclopaedia Britannica*, 10 May 2017.

398 Supreme Court of the Netherlands, *Kelderluik*, ECLI:NL:HR:1965:AB7079, 5 November 1965.

of hazardous climate change, so that several criteria stated below can be derived from hazardous negligence jurisprudence in order to detail the concept of acting negligently towards society. [...]

(i) the nature and the scope of the damage caused by climate change (ii) the knowledge and foreseeability of this damage (iii) the likelihood that dangerous climate change will manifest itself (iv) the nature of the behaviour (or the omissions) of the state and (v) the inconvenience of the precautionary measures to be taken (vi) the discretion of the State to execute its public duties – with due regard for the public-law principles, all this in light of: - the latest scientific knowledge; - the available (technical) option to take security measures, and - the cost-benefit ratio of the security measures to be taken.”<sup>399</sup>

Those criteria bear much resemblance to due diligence in international customary law and human rights law (see sections 0.2.1 and 0.2.2 of the introduction and Part 1.1 and 1.2 above), which is not surprising given that Grotius – an eminent Dutch lawyer – influenced both the development of Dutch and international law, including due diligence<sup>400</sup>. Interestingly, another Dutch lawyer, Roger Cox, contributed to the development of general CDD in the Netherlands and beyond. He was notably one of the lead lawyers at the origin of the *Urgenda* case and the *Shell* case. Before launching these cases, he published a book in 2011, called *Revolution Justified*, in addition to publishing articles in legal journals, laying out how he would apply the *general* duty of care to global warming<sup>401</sup>. The District Court of Den Haag then accepted *Urgenda* and Cox’s arguments<sup>402</sup>. He also predicted the spill-over effect the judgement would have<sup>403</sup>.

In appeal and cassation, the Dutch Court of Appeal and Supreme Court directly applied Articles 2 and 8 of ECHR and the flowing due diligence obligations instead of the domestic tort duty of care, noting, however, that

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399 Den Haag District Court, *Urgenda*, C/09/456689 / HA ZA 13-1396, § 4.63.

400 Bonnichs J and McCorquodale R, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights” (2017) 28(3) *European Journal of International Law* p 903.

401 Cox R, *Revolution Justified: Why Only the Law Can Save Us Now*, trans Elizabeth HD Manton (The Planet Prosperity Foundation 2012); see as well, Cox R, “The Liability of European States for Climate Change” (2014) 30(78) *Utrecht Journal of International and European Law* p 125.

402 Den Haag District Court, *Urgenda*, C/09/456689 / HA ZA 13-1396; see as well Cox R, “A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*” (2016) 34(2) *Journal of Energy & Natural Resources Law* p 143–163.

403 *Ibid.*

the first instance court already considered the latter Convention rights<sup>404</sup>. Of course, the ECHR developments influenced the Member States domestic laws<sup>405</sup>, including Dutch tort law, notably through the doctrine of horizontal effect of the Convention<sup>406</sup>. Conversely, the Dutch jurisprudence, especially the *Urgenda* rulings, heavily influenced the ECtHR case law, notably the *KlimaSeniorinnen* ruling (i.e., the *Urgenda* judgements were a key reference all along the proceedings; for more analysis, see section 1.2.2).

Independent of the implementation of ECtHR's outcome in *KlimaSeniorinnen*, other domestic (case) laws may have already evolved in the direction of *Urgenda* or *Milieudefensie v Shell*, at least to some extent.

The next section 1.3.2 establishes in much more detail the existence of due diligence and its applicability to climate change in French tort law; section 1.3.3 does so with German liability law; and section 1.3.4 with common law jurisdictions.

### 1.3.2 CDD's existence in French Liability Law

This subsection shows that CDD exists in French tort law, including administrative liability law. To show this, subdivision 1.3.2.1 recalls the Roman Law and Napoleonic origins of due diligence and French law; subdivision 1.3.2.2 discusses the main evolutions of tort law; subdivision 1.3.2.3 discusses briefly the separation of private tort law with public tort law; subdivision 1.3.2.4 presents the general environmental duty of care; subdivision 1.3.2.5 addresses the recent statutory recognition regarding the due diligence obligations of parent and procuring companies of multinational corporations in the human rights and environmental area; subdivision 1.3.2.6 eventually argues that French private and public tort law apply to global warming.

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404 Den Haag District Court, *Urgenda*, C/09/456689 / HA ZA 13-1396, § 4.45 – 4.46 and § 4.52.

405 As stated above, domestic courts must supervise compliance with the ECHR in their respective systems (see ECtHR, *Grzęda v Poland* [GC], no. 43572/18 2022, § 324.

406 Milieudefensie et al, *Summons to Shell*, unofficial translation of the Dutch original (2018) § 667, [https://www.climatecasechart.com/documents/milieudefensie-et-al-v-royal-dutch-shell-plc-summons\\_6264](https://www.climatecasechart.com/documents/milieudefensie-et-al-v-royal-dutch-shell-plc-summons_6264), last accessed 20 October 2025.

### 1.3.2.1 The Roman law origins of due diligence in French tort law

In France, the Civil Code (Napoleonic Code<sup>407</sup>) establishes the pillars of tort liability in the following articles:

Article 1240 (former article 1382): “Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.”

Article 1241 (former article 1383): “Everyone is liable for harm which he has caused not only by his action, but also by his failure to act or his lack of care.”<sup>408</sup>

Although these articles do not explicitly mention the duty of care or due diligence, or the reasonable man standard, jurisprudence and legal scholarship unanimously refer to it (*devoir de prudence* or *de diligence, standard de la personne raisonnable ou, autrefois, “du bon père de famille”*). They further refer to the above articles as “*le droit commun*” (common or general law), which “includes the general law of extra-contractual liability for fault under articles 1240 – 1241 [...], except where the parties made contractual arrangements during negotiations.”<sup>409</sup> Hence, French *general* law is applicable by default, and the term is used in France to separate it from contract law and other situations specifically regulated by other provisions<sup>410</sup>, such as the strict liability of parents with respect to their children (Art 1242), strict product liability (Article 1245 et seq.) etc.

The “Napoleonic Code” of 1804, one of the first and most authoritative attempts to codify civil law<sup>411</sup>, is the result of numerous legal contributions

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407 According to the Encyclopaedia Britannica, the Napoleonic Code “was originally introduced into areas under French control in 1804: Belgium, Luxembourg, parts of western Germany, northwestern Italy, Geneva, and Monaco. It was later introduced into territories conquered by Napoleon: Italy, the Netherlands, the Hanseatic lands, and much of the remainder of western Germany and Switzerland. The code is still in use in Belgium, Luxembourg, and Monaco.” (See The Editors of Encyclopaedia, “Napoleonic Code”, *Encyclopaedia Britannica*, 14 November 2023).

408 Cartwright J, Fauvarque-Cosson B and Whittaker S, *Civil Code Translated into English*, commissioned by the Direction des affaires civiles et du sceau, Ministère de la Justice, République française 27.

409 *Ibid*, p 4.

410 See, for instance, Danis-Fatôme A, “La responsabilité civile dans la proposition de directive européenne sur le devoir de vigilance” (2022) *Recueil Dalloz* p 1107.

411 See The Editors of Encyclopaedia, “Napoleonic Code”, *Encyclopaedia Britannica*, 14 November 2023.

and traditions<sup>412</sup>, themselves very much influenced by Jean Domat's (1625 - 1696)<sup>413</sup> major piece « *Les loix civiles dans leur ordre naturel* » published in 1689<sup>414</sup>, which attempted to codify Roman and Christian customs<sup>415</sup>. The roots of the Civil Code go in fact back to Roman times, as section 0.2.2 of the introduction already indicated.

One of the first drafts of the Napoleonic Code illustrated this influence by foreseeing liability when someone was throwing out anything from a house, such as sewer water<sup>416</sup>. Instead of enshrining different specific and casuistic forms of negligence into the Civil Code, its exhaustive review process by the French judicial and other public bodies led to the establishment of a principle-based approach<sup>417</sup>, framed as an *ordre public* provision, meaning it has *jus cogens* character<sup>418</sup>. In short, they impose an obligation of reasonable conduct, such as in Roman law ("*bon père de famille*" or *bonus pater familias* in Latin). For some eminent authors of French legal literature, the current provisions have an elegant, *universal* and open character, leaving much leeway to courts to extend (or not) liability in many different situations, which is criticised at the same time<sup>419</sup>.

Either way, these common roots explain and highlight even more the similarities between the duty of care or due diligence standard enshrined in these articles and the due diligence under international customary law and

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412 Drafted by specialists of the written law tradition (Tronchet, Bigot-Préameneu), and customary law of the South, including Roman law (Portalis, and Maleville), all the major courts of law and counselling bodies (including the Conseil d'Etat) and the Legislative Body (Corps Législatif) reviewed the French Napoleonic Code.

413 Descamps O, "La responsabilité dans le Code civil" (2009) *Histoire de la Justice* No 19 p 291-310; see as well Noda Y, "Jean Domat et le Code civil français. Essai sur l'influence de Domat sur le Code civil français, particulièrement sur ses dispositions relatives à la responsabilité délictuelle" (1956) 3 *Comparative Law Review* p 27.

414 Domat Jean, *Les loix civiles dans leur ordre naturel*, t. 1, 7, 8, 4, 1, Paris, David, 1713, fol. 181.

415 Descamps O, "La responsabilité dans le Code civil" (2009) *Histoire de la Justice* No 19 p 298 - 299.

416 *Ibid*, p 294 referring to Art.17: If water or anything else which causes damage is thrown toward a passer-by from a house inhabited by several people, the person who lives in the flat from which it was thrown is solely liable for the damage. If the person who threw it was identified, he alone is liable; if he was not identified, all are jointly and severally liable. (Own translation).

417 *Ibid*, p 297.

418 *Ibid*, p 302 ; C. Cass, Civ 3 janv 1933: DH 1933. 113, 4 janv 1933 ; C. Cass, Civ 2e, 17 févr. 1955, no 55-02.810: GAJC, 11e éd., no 178; D. 1956. 17, note Esmein; JCP 1955. II. 8951, note Rodière.

419 Viney G, Jourdain P and Carval S, *Traité de responsabilité civile – Les conditions de la responsabilité*, 4th ed, LGDJ, 2013, n° 439.

human rights law (see section 0.2. and subparts 1.1 and 1.2), which protect a significant number of interests while leaving a wide margin of appreciation to the duty-bearers.

### 1.3.2.2 The developments and functions of French liability law

French tort law forbids negligence and requires the exercise of reasonable conduct, by complying with the standard of care or reasonable man standard, or formerly the *bon père de famille* standard<sup>420</sup> (*bonus pater familias*). This standard of conduct expects people to be normally prudent, diligent, and careful, i.e., to implement adequate and to prevent foreseeable harms<sup>421</sup>. The courts in France carry out a foreseeability analysis as they consider *in abstracto* and *in concreto* whether the defendant could reasonably anticipate that his negligence would cause some harm to someone else<sup>422</sup>. These principles led to the historical liability of a company producing medicines.<sup>423</sup> However, if the damage was not foreseeable (*imprévisible*<sup>424</sup>), the courts can dismiss the case for lack of fault or lack of causation<sup>425</sup>.

In 2017, the French Minister of Justice presented a legal reform of the Civil Code, not yet adopted, but which is worth noting, since numerous provisions endeavour to reflect the jurisprudential developments of the law or the consensus within the legal doctrine to carry out these evolutions<sup>426</sup>.

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420 Guinchard S and Debard T, *Lexique des termes juridiques 2022-2023* (Dalloz, August 2022), p 140: « *Bon père de famille* ». See as well, Galuskina K, “Le standard juridique de bon père de famille et la symétrie entre les expressions bon père de famille et bonne mère de famille en droit français” (2017) *Roczniki humanistyczne*.

421 *Ibid*, p 140 ; and p 562 on « Imprévisibilité ».

422 Guinchard S and Debard T, *Lexique des termes juridiques 2022-2023* (Dalloz, August 2022), p 563 on « in abstracto ».

423 Cour de cassation, *Distillbène* (Cass. Ire civ 7 Mars 2006 [2 jugements], pourvoi n 04-16.179 et n 04-16.180, Bull. civ I, n 142 et n 143; RTD civ 2006, p 565).

424 Guinchard S and Debard T, *Lexique des termes juridiques 2022-2023* (Dalloz, August 2022), p 562.

425 According to Guinchard Serge, Debard Thierry, *Lexique des termes juridiques 2022-2023*, Dalloz, Août 2022, p 162.

426 Urvoas J-J, *Projet De Réforme De La Responsabilité Civile*, 13 March 2017 ; see as well the commentary of Mekki M, “Le projet de réforme du droit de la responsabilité civile: maintenir, renforcer et enrichir les fonctions de la responsabilité civile” (2016) p 2 .

Firstly, the reform project proposes a simpler phrasing of the already mentioned articles 1241 and 1242. It explicitly integrates the word “diligence” (including in French):

Article 1241: “A person is liable for damage caused by his fault.

Article 1242: “A breach of a legal prescription or a failure to observe the general duty of care or diligence constitutes a fault.” (In French: “*devoir général de prudence ou de diligence*”).

In addition, the reform project admits partial and collective causation (or rather contribution) to seek proportionate responsibility in the case of bodily harm (art 1240<sup>427</sup>). This proposal reflects former well-known reform projects<sup>428</sup>. It furthermore aims to codify the jurisprudential notion of loss of opportunity or loss of chance, i.e. proving a cause of action to recover partially a damage, when the contribution to it was partial or uncertain (*préjudice de perte de chance*)<sup>429</sup>. Note, in this respect, that the case law of the “*affaire du siècle*” (i.e., *Notre affaire à tous et al v France*) recognises collective and cumulative causation in the climate realm<sup>430</sup>, which should also be relevant for the development of the civil tort liability law<sup>431</sup>.

Concerning preventative legal avenues, the reform project does include a general legal avenue “to prevent the harm or to put an end to the unlawful disturbance to which the plaintiff is exposed” (Article 1266)<sup>432</sup>, akin to the former reform proposal Catala of the Civil Code<sup>433</sup>. Some preventative actions are possible under the *de lege lata*, but are restricted to certain circumstances: a 1970 reform of the Civil code enabled courts to issue preventative measures such as seizure to protect private and family

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427 *Ibid*, see proposed Articles 1239 and 1240.

428 See Art. 1347 - 1348 and 1378 of Catala P, *Avant-Projet de Réforme du Droit des Obligations (Articles 1101 à 1386 du Code civil) et du Droit de la Prescription (Articles 2234 à 2281 du Code civil): Rapport à Monsieur Pascal Clément, Garde des Sceaux, Ministre de la Justice* (22 September 2005).

429 Urvoas J-J, *Projet De Réforme De La Responsabilité Civile*, 13 March 2017, Article 1238.

430 Administrative Court of Paris, *Notre affaire à tous et al v France* (« *affaire du siècle* »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1, § 34.

431 See concurring opinion : Mekki M, “Peut-on repenser la responsabilité à l’aune du devoir de vigilance, pointe avancée de la compliance” in M-A Frison-Roche (dir), *L'obligation de Compliance* (Daloz, coll. “Régulations & Compliance”, 2024).

432 Urvoas J-J, *Projet De Réforme De La Responsabilité Civile*, 13 March 2017, Article 1266.

433 See projet Catala (Article 1369-1), *op cit*.

life<sup>434</sup>; a 1975 reform of the procedural code reinforced interim measures in summary proceedings<sup>435</sup>, a 2008 provision enabled the prevention of bodily harm<sup>436</sup>; and the 2016 reform of the Civil Code enshrined the ability to prevent ecological harm<sup>437</sup>. A general preventative avenue, available in normal proceedings, may therefore be useful. However, such reform may not be necessary for the climate context, as the administrative court of Paris already admitted injunctive relief in the climate case *Notre affaire à tous et al v France*, notably based on the need to prevent ecological harm<sup>438</sup>.

Furthermore, the European Directive on Corporate Sustainability Due Diligence (CSDDD), adopted in June 2024, aims to ensure, especially through its Article 29 on civil liability, the incorporation into general domestic tort law of the principle of shared responsibility or multiple authors – hence, including cumulative causation – and general injunctive relief measures<sup>439</sup>. However, this directive is subject to political renegotiation in 2025. Numerous provisions could be modified or even deleted, including the one on civil liability.

### 1.3.2.3 French administrative rules on State liability include due diligence

The strong separation of powers principle incorporated by the French Revolution in 1789 barred civil courts from citing the State or any other public person as a defendant in a legal case (see “*Loi des 16-24 août 1790 sur l'organisation judiciaire*”, especially Article 13, which is still in force). Administrative law, however, evolved in France in 1882 with the *Blanco* jurisprudence, thereby dismissing the applicability of the above Civil Code articles, creating another legal branch, namely “public law”<sup>440</sup>. Meanwhile, state responsibility in France is mainly organised by case law, akin to common law jurisdictions. However, administrative courts often

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434 Article 9 Code civil.

435 Art. 835 (ancien 809) Code de procédure civile.

436 Art. 16-2 Code civil .

437 Article 1252 du Code civil.

438 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), N°1904967, 1904968, 1904972, 1904976/4-1, (second decision), 14 October 2021, Article 2.

439 See, notably Article 22 (3) and (5) CSDDD.

440 Tribunal des conflits, *Blanco*, 8 févr. 1873.

draw inspiration from Civil Code provisions or even directly apply them<sup>441</sup>, including Articles 1240 et 1241 (general law, see 1.3.2.1 above). Administrative courts also recognise State responsibility for failure to prevent risks in cases of wrongful omission or insufficient protection of rights, including when legislative measures must be adopted for this purpose<sup>442</sup>.

The ECHR is furthermore directly applicable before the administrative judge, meaning that the due diligence standards flowing from the conventions equally apply<sup>443</sup>. The ECtHR also has jurisdiction to review State policies to make sure they do not infringe on human rights, even negligently (see section 1.2.2 above). Hence, numerous, if not all, forms of possible State negligence are recognised, showing in turn a large recognition of *general* due diligence in French public liability law<sup>444</sup>.

Administrative courts can also issue injunctions to prevent or cease the harm, including in full liability cases (*plein contentieux*), as recognised by the *Conseil d'Etat* in 2015<sup>445</sup>. Before that jurisprudence, administrative courts did not allow injunctions to stop or prevent *damage* to avoid interference in the management of the French administration, a conception that was in line with the traditional, stringent views on the separation of powers<sup>446</sup>. Should this mean that administrative courts can now compel the State to remedy preventively defective legislation? This will remain for some time an open question, as there is no case law in this respect. In the climate case *affaire du siècle*, the Paris administrative court merely forced the State to enact additional measures to comply with its former GHG

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441 Sauvé J-M, “Le dualisme juridictionnel : synergies et complémentarité” (Speech, Cycle approfondi d’études judiciaires 2016/2017 ‘L’autorité judiciaire dans l’État’); Plessix B, *L’utilisation du droit civil dans l’élaboration du droit administratif* (PhD thesis, Panthéon-Assas 2003).

442 See, for instance, Supreme Administrative Court of France (Conseil d’Etat), *Ministre de l’emploi et de la solidarité c/ Consorts Thomas*, n° 241152, 3 mars 2004. See as well, Aguila Y, “Petite typologie des actions climatiques contre l’État” (2019) *AJDA* 1853.

443 Sauvé J-M, “Les 60 ans de la Convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales”, *Colloque organisé par l’Université de Paris 3 Sorbonne Nouvelle, Sénat*, 9 avril 2010.

444 The Administrative Supreme Court (Conseil d’Etat) concurs with this position, see its commentary of the Blanco case: Conseil d’État, “Commentary of ‘Tribunal des conflits, 8 février 1873, Blanco’”, in *Les grandes décisions du Conseil d’État et du Tribunal des conflits*, 8 February 2019, <https://conseil-etat.fr/decisions-de-justice/jurispudence/les-grandes-decisions-depuis-1873/tribunal-des-conflits-8-fevrier-1873-blanco>, last accessed 19 October 2025.

445 Supreme Administrative Court of France (Conseil d’Etat), 27 July 2015, no. 367484; *AJDA*, 2015, p 2277, note by Alix Perrin.

446 Rouquette R, *Petit traité du procès administratif 2018/19* (Daloz 2018) § 322.211.

reduction objectives set in its regulatory act (*décret*); it was not intended to remedy any defects in legislation.

#### 1.3.2.4 The French general environmental duty of care and the possibility of seeking preventative measures through injunctive relief

In 2005, the French lawmakers adopted the French Environmental Charter with the constitutional law n° 2005-205 of 1er March 2005, setting out various rights, duties and principles in environmental matters. The Environmental Charter has a constitutional value, meaning it is at the top of the French hierarchy of norms. The Constitutional Council subsequently derived in its 2011 *Michel Z* decision a general obligation of environmental vigilance from articles 1 and 2 of the French Environmental Charter<sup>447</sup>. This obligation is the environmental pendant of the general duty of care in tort law. According to Franck Terrier, former President of the Third Civil Chamber of the Court of Cassation:

“[A]s interpreted by the decision of the Constitutional Council of April 8, 2011, the Charter imposes not only on the public authorities and the administrative authorities but also on every person an obligation of vigilance, each being required to answer for the environmental damage that may result from his or her activity, and the right to sue for damages may not be restricted under conditions that distort its scope. Once these principles have been established, it is up to the judges to give them life.”<sup>448</sup>

The Cassation Court recently gave life to this general duty in the so-called “*Dieselgate*” case, involving contractual obligations of the producer (Volkswagen) with respect to the consumer<sup>449</sup>. More generally, one may request enforcement of the obligation of environmental vigilance in the event of *risk* of damage, or if damage occurs<sup>450</sup>. This perspective is perfectly consist-

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447 Constitutional Council of France (Conseil Constitutionnel), n° 2011-116 QPC of 8 April 2011.

448 Neyret L and Martin G J (dirs), *Nomenclature des préjudices environnementaux* (LGDJ 2012) preface Terrier F, p 2.

449 Cour de Cassation, n° V 23-23.869, 24 septembre 2025.

450 Foucher K, “La première application de la Charte de l’environnement par le Conseil constitutionnel dans le cadre de la QPC : de l’inédit, de l’inutile et du flou” (2011) *A.J.D.A.* p 1158.

ent with the recently introduced articles 1246-47 and 1252 of the Civil Code, which respectively provide a right to compensation for environmental harm<sup>451</sup> and to enforce reasonable measures to prevent or stop it<sup>452</sup>. While the latter means that ecological risks may be prevented by way of litigation without the occurrence of a proper injury<sup>453</sup>, note that in 2012, French courts, including the Court of Cassation, recognised that a “pure” ecological loss *can* be recoverable in the famous *Total Erika oil spill* case, caused by a boat of TotalEnergies’s subsidiaries, for facts dating back to 1999<sup>454</sup>. Thus, the case law already provided the legal basis for asking compensation for ecological harm even before the legislative reform in 2016.

### 1.3.2.5 The law on the Duty of Vigilance of parent and procuring companies in human rights and environmental matters

France adopted in 2017 a law to impose a “Duty of Vigilance on Parent and Procuring Companies”, obliging them to identify and prevent serious related human rights and environmental harms resulting from the subsidiaries and suppliers’ activities.

The Duty of Vigilance Law refers to the general articles of civil tort law (i.e., Articles 1240 and 1241 of the Civil Code) to establish liability<sup>455</sup>. Since these articles require a duty of prudence, or due diligence, courts must apply civil liability mechanisms and find a causal link between the

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451 Article 1246 Civil code (current version – own translation): “Any person responsible for ecological damage is obliged to compensate for it.” Article 1247 Civil code (current version – own translation): “Ecological damage consisting of non-negligible harm to the elements or functions of ecosystems or to the collective benefits derived by man from the environment may be compensated in accordance with the conditions laid down in this Title.”

452 Article 1252 Civil code (current version – own translation): “Independently of the compensation for the ecological damage, the judge, seized of a request to this effect by a person mentioned in article 1248, may prescribe reasonable measures to prevent or stop the damage”.

453 Trébulle François-Guy, “La consécration de l’accueil du préjudice écologique dans le Code civil”, *Énergie – Environnement – Infrastructures*, LexisNexis JurisClasseur, November 2016; Mekki M, “Peut-on repenser la responsabilité à l’aune du devoir de vigilance, pointe avancée de la compliance” in M-A Frison-Roche (dir), *L’obligation de Compliance* (Daloz, coll. “Régulations & Compliance”, 2024).

454 Cour de cassation, crim., *Erika*, n° 10-82-938, 25 septembre 2012.

455 Article L225-102-5 du Code de commerce, créé par la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre .

lack of vigilance and the damage to establish liability. There is additional consistency between the Duty of Vigilance Law and Article 1240 Civil Code due to the conceptual similarities: the latter already contains a duty of care as shown above (i.e., *devoir de prudence* or *devoir de diligence*, see subdivision 1.3.2.1). Hence, the Duty of Vigilance Law does not constitute any *lex specialis derogat legi generali*. Both rules coexist, and the former only specifies that general law imposes a duty of care on parent and procuring companies to avoid harm to others and the environment potentially caused by subsidiaries and suppliers – an opinion that the case law recently confirmed<sup>456</sup>.

Despite the legislative intervention to establish the Duty of Vigilance Law, it seems arguable that these duties could also have emerged from the incremental evolution of case law, notably based on general due diligence. Firstly, Ruggie drew from the ubiquitous general due diligence concept (stemming from Roman law) to bring together human rights and due diligence (see section 0.2.2 of the introduction). The precise purpose of the Duty of Vigilance Law is to enshrine these principles in French law<sup>457</sup>. Prior to the adoption of this law, the aforementioned Catala<sup>458</sup> and Terré Civil Code Reform Projects also sought to introduce such a duty. But the case law has already required parent companies to carry out due diligence. For example, in the *Total Erika* case<sup>459</sup>, the Court of Cassation found the parent company guilty of a lack of monitoring of the safety of an oil tanker chartered by a subsidiary. The Court of Cassation held Total liable for the resulting oil spill because the company had previously pledged to prevent any damage caused by its subsidiary, but failed to do so (i.e., the Court based its decision on Total's personal and voluntary commitment to inspect the tanker). Notwithstanding this specific circumstance (the voluntary commitment), this case may show more generally that a parent company must prevent damage if it is aware of the risk of damage and is in a position to exercise control and influence; otherwise, it can be held accountable. Moreover, in a considerably less well-known case, the Court

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456 See a similar opinion by the Paris Court of Appeal in the *Total Climate* case stating that the Duty of Vigilance Law “did not create a special liability regime” (Court of Appeal of Paris, *Notre affaire à tous et al v TotalEnergies*, n° RG 23/14348, 18 June 2024, p 23).

457 Proposition De Loi n°2578 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Exposé des motifs, p 4, § 1.

458 See the proposed Article 1360 Civil Code.

459 Cour de cassation, crim., *Erika*, n° 10-82-938, 25 septembre 2012.

of Cassation found a parent company liable for having taken “harmful decisions” for the subsidiary based on articles 1240 and 1241 of the Civil Code<sup>460</sup>.

As to causation, its demonstration faces substantial difficulties due to the conflicting *in solidum* principle, which requires full compensation for the damage. However, in cases where the dominant company’s contribution to the damage is only minimal or difficult to estimate, the French courts can still hold the parent company liable for causing a “loss of chance” or “loss of opportunity”<sup>461</sup>. This concept allows, in principle, the establishment of a causal link between the lack of vigilance and the resulting damage, even if it is indirect, weak or even difficult to determine. It may thus have an advantage, for the applicant who does not have to demonstrate an extremely precise causal link<sup>462</sup>.

At least three climate cases against parent companies of transnational corporations rely on the Duty of Vigilance and the compensation of the ecological harm or the corresponding loss of chance (*perte de chance*)<sup>463</sup>, making these cases CDD ones.

### 1.3.2.6 General due diligence certainly applicable to climate matters, including between private persons

In the “*Affaire du siècle*” case, the Administrative Court of Paris established the State’s liability for contributing to global warming, as this constitutes ecological harm (*prejudice écologique*).<sup>464</sup> The Court inferred a duty from the State’s ratification of international climate conventions and the

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460 Cour de cassation, soc., *Sofarec*, n° 13-15.573, 8 juillet 2014.

461 Danis-Fatôme A, “La responsabilité civile dans la proposition de directive européenne sur le devoir de vigilance” (2022) *Recueil Dalloz* p 1107.

462 See, among others, Cour de cassation, Civ 1 re, 14 oct. 2010, n o 09-69.195 , P I, n o 200, préc ; C. Ruellan, art. préc., n os 27 et 35 ;

463 Case summary and documents of *Notre Affaire à Tous and Others v Total*: [https://www.climatecasechart.com/document/notre-affaire-a-tous-and-others-v-total\\_85ea](https://www.climatecasechart.com/document/notre-affaire-a-tous-and-others-v-total_85ea); Case summary and documents of *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v BNP Paribas*: <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>; See Case of *Envol Vert et al v Casino*: -Case summary and complaint: <https://climatecasechart.com/no-n-us-case/envol-vert-et-al-v-casino/>, last accessed 28 October 2025.

464 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), 3 February 2021, n°1904967, 1904968, 1904972, 1904976/4-1, § 16.

adoption of domestic legislative and regulatory targets<sup>465</sup>. Additionally, it acknowledged the existence of a *general* duty to fight climate change and limit global warming to 1.5°C. However, the Court found no breach on this basis<sup>466</sup>. Instead, it held that liability arose from the State's failure to respect its own 2015-2018 GHG budget<sup>467</sup>. Consequently, the Court enjoined the State to compensate for exceeding its GHG carbon budget 2015-2018 by ensuring that emissions would come below this budget before the end of 2022<sup>468</sup>. Since not only the State contributes to global warming, but primarily private persons, civil courts should similarly consider contributions by private parties to ecological harm as unlawful, particularly if a breach of a legal obligation, such as CDD, can be established<sup>469</sup>.

Furthermore, in *Grande-Synthe*, the Administrative Supreme Court found that the State was not on track to achieve the legislative 2030 GHG reduction target of -40% compared to 1990<sup>470</sup>. This failure constituted an "*excès de pouvoir*" (*ultra-vires*, i.e., an unlawful conduct)<sup>471</sup>. This decision of the Conseil d'Etat further shows the acceptability of using tort law principles in the climate realm.

Since both private and public persons must comply with due diligence in order to avoid liability under French law, and given that global warming threatens numerous legal interests protected under this jurisdiction, it is reasonable to assume that CDD applies there, based on the above findings. However, as no final decision has yet been made in climate cases against private companies, it is impossible to rely on any fully confirmed and consolidated authority in this area at this stage. Still, on 18 June 2024, the Paris Court of Appeal ruled that a CDD case against TotalEnergies was admissible. This means that claimants have standing to request multinational actors to comply with CDD included in the Duty of Vigilance Law and the general obligation of environmental care<sup>472</sup>. This decision

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465 *Ibid*, § 21.

466 *Ibid*, § 32.

467 *Ibid*, § 31.

468 Administrative Court of Paris, *Notre affaire à tous et al v France*, 14 October 2021 (second decision), Article 2.

469 See concurring opinion : Mekki M, "Peut-on repenser la responsabilité à l'aune du devoir de vigilance, pointe avancée de la compliance" in M-A Frison-Roche (dir), *L'obligation de Compliance* (Dalloz, coll. "Régulations & Compliance", 2024).

470 Supreme Administrative Court, *Grande-Synthe*, n° 427301, 19 November 2020.

471 *Ibid*.

472 Court of Appeal of Paris, *Notre affaire à tous et al v TotalEnergies*, n° RG 23/14348, 18 June 2024, p 19 - 22: "The purpose of the action brought is to enjoin TotalEner-

should likely mean that corporate human rights and environmental due diligence require, in principle, climate mitigation<sup>473</sup>; however, the extent of this obligation will be debated during the proceedings on the merits.

Furthermore, corporate practices tend to confirm the existence of CDD. Indeed, at least 25 transnational companies address climate mitigation matters in their vigilance plans, including TotalEnergies and BNP Paribas; note that both companies are sued in cases based on CDD<sup>474</sup>. In those documents, TotalEnergies has set out a “vision of a Net Zero TotalEnergies in 2050, together with society”<sup>475</sup>; and BNP Paribas has committed to aligning its objectives with the 1.5°C goal of the Paris Agreement objectives<sup>476</sup>. These elements demonstrate an attempt by multinational corporations to show compliance with the CDD duty.

Additionally, the European Directive on Corporate Sustainability Due Diligence Directive (CSDDD), adopted definitively in 2024, sets out similar *procedural* and *substantive* CDD obligations, including a duty to establish climate transition plans in Article 22<sup>477</sup>. However, this climate provision

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gies to include in its due diligence plan measures to identify the risks associated with the emission of GHGs that cause global warming and to reduce them through actions to be taken at the level of the activities of its group entities and those of its subcontractors, activities that take place in different parts of the world [...]. As global warming affects the entire planet, the purpose of the action is to publish and implement measures likely to help reduce this phenomenon and its harmful consequences on a worldwide scale. It follows that the action taken is in the global public interest [...]. The interest of the associations Notre Affaire à Tous, Sherpa and Zéa in taking action is not contested. [...] These associations will therefore be deemed admissible in their action”. (Own translation).

473 See concurring opinions of the legal literature: Trébulle François-Guy, “Responsabilité et changement climatique : quelle responsabilité pour le secteur privé ?”, *Énergie – Environnement – Infrastructures*, no 8–9, August–September 2018, Lexis Nexis, p 26 ; see furthermore, Rochfeld J, “Sur l’apport de la loi vigilance en matière environnementale et climatique” in Mougeolle P and Chaigneau A (eds), *Entreprises et Communs* (La Revue des droits de l’homme 2020); Mekki M, “Peut-on repenser la responsabilité à l’aune du devoir de vigilance, pointe avancée de la compliance” in M-A Frison-Roche (dir), *L’obligation de Compliance* (Dalloz, coll. “Régulations & Compliance”, 2024).

474 For a comparative review, see Notre Affaire à Tous, *Benchmark de la vigilance climatique des multinationales* (2023).

475 TotalEnergies, *Document d’enregistrement universel 2021* p 166.

476 BNP Paribas, *Document d’enregistrement universel et rapport financier annuel 2022* p 700.

477 See CSDDD - Corporate Sustainability Due Diligence Directive (“Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence”).

was surprisingly removed in December 2025, a legislative amendment which was confirmed at the beginning of 2026<sup>478</sup>. This political reform, adopted in a context in which the Trump administration exercised pressure on the EU institutions to remove this provision, alongside fossil fuel producers such as Exxon and TotalEnergies<sup>479</sup>, seems inconsistent with the State CDD duty to regulate corporate actors under international and human rights law<sup>480</sup>, but also with the non-regression principle, recognised both in the Treaties and in the CSDDD<sup>481</sup>.

Thus, despite the removal of Article 22 CSDDD, these developments still suggest the applicability of general liability law to climate change, as well as the corresponding recognition of *general* CDD in France. Accordingly, this dissertation concludes that general due diligence applies to climate matters<sup>482</sup> and requires a 1.5°C limitation given the previous court findings.

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478 See Council of the EU, Council and Parliament strike a deal to simplify sustainability reporting and due diligence requirements and boost EU competitiveness (Press release, 9 December 2025), <https://www.consilium.europa.eu/en/press/press-releases/2025/12/09/council-and-parliament-strike-a-deal-to-simplify-sustainability-reporting-and-due-diligence-requirements-and-boost-eu-competitiveness/>. See the consolidated Directive here: Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting requirements and certain corporate sustainability due diligence requirements (Text with EEA relevance).

479 Leth D O, The secretive cabal of US polluters that is rewriting the EU's human rights and climate law, *SOMO*, 3 December 2025.

480 See the concurring opinion by more than fifty Professors of Law: Wetzer T et al, Legal Scholars: "Abandoning Article 22 CSDDD Risks Policy Incoherence and Litigation Risk", 23 November 2025 Letter-from-legal-scholars-on-Art.-22-CSDDD.pdf.

481 Article 191 (1) Treaty on the Functioning of the EU obligates Member States of the EU to pursue progress regarding the protection of the environment and human health; hence, any regression should be prevented. Article 1 (2) CSDDD also provides for a similar principle, while noting that the 2026 version of the Directive was modified in a manner to combat the emergence of climate obligations through the incremental development of domestic (case) laws.

482 See, for concurring opinions: Trébulle François-Guy, "Responsabilité et changement climatique : quelle responsabilité pour le secteur privé ?", *Énergie – Environnement – Infrastructures*, no 8–9, August–September 2018, Lexis Nexis, p 26; Rochfeld J, "Sur l'apport de la loi vigilance en matière environnementale et climatique" in Mougeolle P and Chaigneau A (eds), *Entreprises et Communs* (La Revue des droits de l'homme 2020); see also Danis-Fatôme A and Hoffschir N, "La loi sur le devoir de vigilance rendue inefficace par le juge – Observations sous Tribunal judiciaire de Paris, 5e ch., 2e sect., 6 juillet 2023, n° 22/03403, Total Energies" (2023) *Revue des sociétés* p 793, § 26.

Lastly, while CDD seems manifestly applicable in France today, it should also be the case historically. Indeed, the French Cassation Court has previously recognised that the vigilance obligation (due diligence) extends to uncertain scientific elements, even facts dating back to the 1970s<sup>483</sup>.

Finally, note that in Belgium, the Court of Appeals of Brussels interpreted in the *Klimatzaak* case the “*devoir de prudence et de diligence*” or the “*standard du bon père de famille*” from Articles 1382 and 1383 of the Belgium Civil code as requiring a CDD duty to limit global warming to 1.5°C from the State (note that the Belgium Civil Code stems from the Napoleonic Code and that its Articles 1382 and 1383 correspond to Articles 1240 and 1241 of the French Civil code, recently renumbered, as previously discussed)<sup>484</sup>. More concretely, the Court mandated a 55% reduction by 2030 compared to 1990 in this case, which it considered the minimum necessary for an EU Member State in light of the so-called “European Climate Law” of 2021 that imposes this reduction target<sup>485</sup>. In Belgium, no separation between private and public law occurred like in France; therefore, the *general* due diligence of the Napoleonic Code remains applicable to the State (see subdivision 1.3.2.3 above). However, since these articles also apply to private persons, it is likely that the Belgian Courts’ reasoning extends to them as well. Additionally, this ruling is relevant for the French context, given the shared legal foundations in both countries.

### 1.3.3 CDD’s existence in German tort law

Subsection 1.3.3.1 outlines the ground principles of German tort duty of care and the common Roman law, highlighting the similarities between the function of due diligence in German law and in Dutch and French tort law. Subsection 1.3.3.2 describes how the German State *can* be held accountable under tort liability and constitutional law. Subsection 1.3.3.3 explains that

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483 Cour de cassation, *Distilbène* (Cass. Ire civ 7 Mars 2006 [2 jugements], pourvoi n 04-16.179 et n 04-16.180, Bull. civ I, n 142 et n 143; RTD civ 2006, p 565, obs. P Jourdain; 1st esp, D. 2006, IR p 812, and the NDLR.

484 Court of First Instance of Brussels (French-speaking), *Klimaatzaak*, 2015/4585/A, 17 June 2021, p 58 and 83.

485 Court of Appeal of Brussels, *Klimatzaak*, 2021/AR/1589, 2022/AR/737 et 2022/AR/891, 30 November 2023, p 107, § 203 referring to “Regulation (EU) 2021/1119 of The European Parliament And Of The Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’)”.

German law permits the preventive enforcement of due diligence, including through injunctions. Subsection 1.3.3.4 addresses the latest developments in legislation and case law in the realm of multinational accountability. Subsection 1.3.3.5 finds that the general due diligence under tort, human rights and constitutional law in Germany is applicable to climate change, including very likely between private actors. Subsection 1.3.3.6 briefly touches upon the question of whether there is a need to find a breach of CDD as a legal duty to enforce climate action.

### 1.3.3.1 Roman origins and basic structures of the German tort duty of care

In Germany, the general due diligence obligation is labelled *Sorgfaltspflicht*, *Verkehrssicherungspflicht* or *Verkehrspflicht* and stems from section (or article) 823 (1) of the German Civil Code (*Bürgerliches Gesetzbuch - BGB*):

“Section 823 Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.”<sup>486</sup>

Although the terms “duty of care” or “due diligence” are not explicitly mentioned in the quoted provisions above, German commentators and courts unanimously confirmed the concept’s existence, accepted as customary law<sup>487</sup>. Everyone has a duty of care when creating a danger that could harm others<sup>488</sup>. While section 823 (2) opens up the possibility of relying on specific statutes and duties of care to hold someone accountable, the “customary” duty of care of section 823 (1) can already fulfil this *function*<sup>489</sup>. Courts remain the main developers of this duty. Hence, the duty of care in

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486 See the official translation of the BGB online: [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/), last accessed 28 October 2025.

487 Spindler G, *Beck-online Großkommentar, BGB § 823*, 1 November 2022 § 99.

488 *Ibid* § 98.

489 *Ibid*, § 257; see as well Staudinger A, “§ 823” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2021), § 62.

Germany belongs to the “common”, “customary” or “general” branch of the German legal system, as is the case in France (see subsection 1.3.2.1 above) and the Anglo-American legal systems (see subsection 1.3.4.1 below).

Before the adoption of the BGB at the beginning of the 20<sup>th</sup> century, the Roman law *Lex Aquila* partly governed, or at least influenced German tort law<sup>490</sup>. The German Civil Code was adopted in 1896, almost an entire century after the adoption of the Napoleonic Civil Code, which also applied in some Western regions of Germany<sup>491</sup>.

In any case, the principles of tort liability for damages are very similar to those of general law in France and the Netherlands, as well as to human rights law and international law. These principles rest on three common pillars:

– *Rechtswidriger Eingriff* – i.e., the unlawful encroachment:

The unlawful encroachment on protected rights means that certain interests (*Rechtsgüter*) must be harmed. According to Section 823 BGB, these are “life, body, health, freedom, property or another right of another person”. These interests overlap with the first generation of human rights. Additionally, some dangerous and harmful conduct can be classified as objectively unlawful according to the case law (so-called “*Gefährdungshaftung*” – see subdivision 1.3.3.6)<sup>492</sup>.

However, pure monetary losses (*reine Vermögensschäden*), for instance, cannot give rise to a duty to provide compensation under German tort law, as in English law<sup>493</sup>. While the concept of *Rechtswidrigkeit* (unlawfulness) focuses mainly on the harm caused, it also encompasses the conduct giving rise to it<sup>494</sup>.

– *Verschulden* – i.e., breach of a duty:

This criterion assesses the extent to which someone breached negligently or wilfully a standard of care (*Verkehrssicherungspflichten* – which may be lit-

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490 Wagner G, *BGB § 823 Schadensersatzpflicht, Münchener Kommentar zum BGB*, 8th ed, 2020 § 1. See concurring opinion: Rheinstejn M, Glendon M A and Carozza P, “Civil Law” *Encyclopaedia Britannica* (4 August 2023) <https://www.britannica.com/topic/civil-law-Romano-Germanic>, last accessed 15 January 2024.

491 See: The Editors of Encyclopaedia, “Napoleonic Code”, *Encyclopaedia Britannica*, 14 November 2023.

492 Wagner G, *BGB § 823 Schadensersatzpflicht, Münchener Kommentar zum BGB*, 8th ed, 2020 § 7.

493 *Ibid*, § 423.

494 *Ibid*, § 5.

erally translated as a “duty to secure interrelations and traffic with others”) or a specific duty enshrined in a statute<sup>495</sup>. The general standard of care is an open norm (akin to the “reasonable person” standard in France and in common law (formerly “*bonus pater familias*”) and its breach depends on the concrete facts of the case (i.e., *Tatbestand*), therefore requiring an *in concreto* assessment by courts to find breach<sup>496</sup>. Negligence may not only be the result of action, but of omission as well<sup>497</sup>.

– *Kausalität* – i.e., causation:

To hold someone accountable, there is a need to prove a causal link “with probability bordering on certainty”<sup>498</sup>. According to the German Civil Federal Supreme Court (*Bundesgerichtshof*), “a degree of certainty is sufficient that would silence doubts of a prudent, conscientious and life-experienced assessor”<sup>499</sup>. Thus, 100% scientific certainty is not required (see more elaboration in this respect in Subpart 2.2 on causation).

In any case, given the similarities between these tort-related principles and international law, human rights liability law and French law, it is reasonable to assume that German tort due diligence applies to climate-related issues (see subsection 1.3.3.5 below for a more detailed analysis in this respect).

### 1.3.3.2 State responsibility under the German Civil Code (Amtshaftung)

Section 839 BGB, which concerns liability of civil servants, is modelled after section 823 (basic tort law), and, therefore, includes liability for negligence<sup>500</sup>. The principle of the standard of the “average official” (“*pflichtgetreuten Durchschnittsbeamten*”) applies, which is similar to the reasonable

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495 Staudinger A, “Vorbemerkung zu §§ 823–853” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2022), § 1 – 4.

496 Wagner G, *BGB § 823 Schadensersatzpflicht, Münchener Kommentar zum BGB*, 8th ed, 2020 § 26.

497 *Ibid.*, § 60. See as well: Staudinger A, “§ 823” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2021), § 61.

498 Wagner G, *BGB § 823 Schadensersatzpflicht, Münchener Kommentar zum BGB*, 8th ed, 2020 § 70.

499 German Supreme Court (*Bundesgerichtshof*), VI ZR 259/06, 8 July 2008 (NJW 2008, 2846), § 22.

500 See here the official translation of the German Civil Code BGB, [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/), last accessed 28 October 2025.

person standard of care (*bonus pater familias, personne raisonnable*). If the plaintiff also invokes section 34 of the German Constitution<sup>501</sup> as a complementary legal basis, section 839 BGB becomes applicable to the State as a legal person<sup>502</sup>. Other legal bases exist to ground State liability, for instance, when the State carries out expropriations or other acts which bear a similar effect. The applicability of those articles in climate matters is conceivable, according to some authors of the literature<sup>503</sup>.

The German constitution also protects human rights, including those of the ECHR<sup>504</sup>, by setting out duties to protect (*Schutzpflichten*), and granting individuals the ability to file constitutional cases against the State<sup>505</sup>, including to challenge legislative insufficiencies. Legislation is, under some circumstances, required to fulfil the duty to protect and to achieve a certain level of protection. However, under the German constitution, only the lawmaking Parliament has the power to balance fundamental rights against each other according to the concept of the “*Vorbehalt des Gesetzes*” – i.e., the reservation of the law<sup>506</sup> (see subpart 2.3 on redressability, addressing more specifically the separation of powers).

In the German Constitutional case concerning the Climate Protection law, the Court established that some provisions of the latter Law infringe the Constitution<sup>507</sup>, ultimately showing that constitutional *general* CDD exists in Germany (see subsection 1.3.3.5 below for a more detailed analysis in this respect).

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501 See here the official translation of the Basic Law of Germany (*Grundgesetz*), [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/), last accessed 28 October 2025.

502 Staudinger A, “§ 839 Haftung bei Amtspflichtverletzung” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2021), § 10.

503 Saurer J and Purnhagen K, “Klimawandel vor Gericht – Der Rechtsstreit der Nichtregierungsorganisation ‘Urgenda’ gegen die Niederlande und seine Bedeutung für Deutschland” (2016) *ZUR* p 21; Deutscher Bundestag, Wissenschaftliche Dienste, *Rechtliche Grundlagen und Möglichkeiten für Klima-Klagen gegen Staat und Unternehmen in Deutschland*, 2016, p 15.

504 See, among others, the fundamental and human rights in Art 1 – 3, and Art 12 and 14 of the *Grundgesetz*.

505 To claim an infringement of individual constitutional rights, see the conditions under art 90 – 93 *Bundesverfassungsgerichtsgesetz - BVerfGG*.

506 See Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, *Headline 5*; see as well § 260 and 262.

507 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021.

1.3.3.3 The possibility of seeking preventative enforcement of due diligence, including through injunctions

German law rather provides for corrective and reparatory actions after damage has occurred (with the aim of providing compensation) but also injunctive reliefs in some cases (*Unterlassungs- und Beseitigungsansprüche, bzw. einstweilige Verfügungen, oder Leistungsklage bzw. Verpflichtungsklage*). According to some authors of the literature, the ability to issue injunctions stems from the Roman action of *actio negatoria* or *quasinegatoria*<sup>508</sup>. Section 1004 BGB sets out the main tort criteria in tort to request an injunction. In principle, it requires interference with protected interests, meaning some sort of damage must have arisen, but the threat of damage may suffice in some cases<sup>509</sup>.

“Section 1004 Claim for removal and injunction

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference.”

According to the jurisprudence, section 1004 is also applicable if the interests protected by the traditional tort basis of Section 823 BGB – namely, life, body, health, freedom, property or another right – are infringed<sup>510</sup>. As paragraph 2 indicates, courts may reject an injunction if the claimant has to tolerate a preexisting interference (i.e., if it is not disproportionate, and where a court needs to strike a balance between competing interests<sup>511</sup>).

With regard to climate-related case law, numerous civil courts in Germany have declared climate-related injunction requests admissible in prin-

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508 Staudinger A, “Vorbemerkung zu §§ 823–853” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2022), § 10.

509 *Ibid.*, § 11.

510 Deutscher Bundestag, Wissenschaftliche Dienste, *Rechtliche Grundlagen und Möglichkeiten für Klima-Klagen gegen Staat und Unternehmen in Deutschland*, 2016 referring to “Palandt-Sprau, BGB, 74. Aufl. 2015, Einf v § 823 Rdnr. 27”; Staudinger A, “Vorbemerkung zu §§ 823–853” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2022), § 10.

511 German courts did so in the climate cases against carmakers: see Landgericht Braunschweig, *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023; Landgericht Stuttgart, *Mercedes (or Daimler) case*, 13.9.2022 – 17 O 789/2.

ciple, but have not yet granted them on the merits. For example, the Court of Appeal of Hamm ruled that the climate adaptation case of *Lliuya v RWE* was admissible<sup>512</sup> and that private actors could be held liable, provided that evidence could show that the harm was caused by climate change<sup>513</sup>. Additionally, the first instance court of Braunschweig admitted a mitigation case against Volkswagen but rejected it on the merits (note that there is, though, an appeal pending before the Supreme Court)<sup>514</sup>. This pattern of admissibility in principle without substantive outcomes raises questions about the extent to which *general* CDD can be addressed in Germany (see subpart 2.3).

The German constitution also enables seeking the judicial review of State acts (legislation, court decisions or any act of public authority) in cases of constitutional violations. As already mentioned, the Constitutional Court obliged the lawmaker to rectify some parts of its Climate Protection Law, showing the recognition of *constitutional* CDD in Germany (see the judgment's analysis on redressability aspects in subdivision 2.3.2.3 below)<sup>515</sup>.

#### 1.3.3.4 The Supply Chains Act and the case law on the liability of parent and procuring companies

The recent Supply Chains Act imposes a due diligence obligation (*Sorgfaltspflicht*) on procuring companies to oversee their supplies<sup>516</sup>. Since this statute does not foresee any explicit application in climate matters, it is uncertain whether the “Office for Economic Affairs and Export Control” (BAFA<sup>517</sup>), the public administrative body in charge of its enforcement, could apply it to climate-related facts<sup>518</sup>. If the enforcement body deems that this Act does not apply to climate, civil liability law could take over, as

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512 Court of Appeal of Hamm, (Oberlandesgericht, hereafter: OLG Hamm), *Saül Luciano Lliuya v RWE*, Az. 5 U 15/17, 30 Nov 2017.

513 Court of Appeal of Hamm, *Saül Luciano Lliuya v RWE*, Az. 5 U 15/17, 28 May 2025.

514 Court of First Instance of Brunswick (Landgericht Braunschweig), *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023, see especially p 12 and 15.

515 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021.

516 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, 16 Juli 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021.

517 In German: Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA).

518 See for a concurring opinion: Verheyen R, “Das Lieferketten-Sorgfaltspflichtengesetz: Auslegung der Umweltsorgfaltspflichten und Ansätze zur praktischen Umsetzung”, *Umweltbundesamt*, 2024 p 35–36.

Section 3 (3) and 11 (1) of the Act states that: “A breach of the obligations under this Act shall not give rise to any civil liability. Any civil liability established independently of this Act shall remain unaffected.”

Nonetheless, this PhD arrives at the conclusion that climate change is indirectly covered by the Supply Chains Act, which requires companies to “exercise due diligence in their supply chains” to prevent “human rights risks”. Since climate change endangers human rights as established above (see subpart 1.2), applicability to global warming should be possible. The Supply Chains Act also requires due diligence when there is a sufficient probability of a violation of one of the following prohibitions”, including “air pollution, harmful noise emission or excessive water consumption, which a) significantly impairs the natural basis for the preservation and production of food, b) denies a person access to safe drinking water, c) impedes or destroys a person's access to sanitary facilities, or d) harms the health of a person.”<sup>519</sup> As air pollution is covered by the statute, and because GHG emissions significantly impair the environment and the health of persons, one should be able to reaffirm its application to climate issues<sup>520</sup>.

However, the applicability of the German Supply Chains Act to climate change still requires an interpretative effort by the BAFA. As a non-independent public enforcement body, the BAFA may be reluctant to take this step and may argue that it does not know what to do or how to do it. While an affected person may request BAFA to initiate an investigation if their rights are violated or threatened by a company’s failure to comply with its due diligence obligations<sup>521</sup>, the interpretation by a court may be necessary (perhaps a higher court, even the Supreme Court, given the presence of difficult questions of principle).

Note that the Supply Chains Act authorises affected parties to launch civil proceedings in cases of “serious harm”, including with the assistance of

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519 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, 16 Juli 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021, Section 2 (2) (9).

520 See the case law from the US Supreme Court which could ground such an interpretation: SCOTUS, *Massachusetts v EPA*, 549 U. S. \_\_\_\_ (2007). See as well: Verheyen R, “Das Lieferketten-Sorgfaltspflichtengesetz: Auslegung der Umweltsorgfaltspflichten und Ansätze zur praktischen Umsetzung”, *Umweltbundesamt*, 2024 p 35–36.

521 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, 16 Juli 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021, Artikel 14.

NGOs or trade unions<sup>522</sup>. NGOs will certainly do everything within their power to convince BAFA or courts to take action on climate matters under this Act. Their case *could* have been eased with the European legislative developments, which introduced a duty to establish a transition plan to show compatibility with the 1.5°C duty under the CSRD and the CSDDD, whose transposition may replace or complement the Supply Chains Act<sup>523</sup>. However, as already noted in subdivision 1.3.2.6, Article 22 CSDDD has been removed through the “Omnibus” legislative amendment.

In any case, like the French law, the German Supply Chains Act does not constitute *lex specialis* derogating the German *legi generali* since it also explicitly provides for the applicability of the BGB (see just above, subdivision 1.3.2.5). Moreover, the Parliament adopted the German Supply Chains Act to implement the UNGPs<sup>524</sup>, which was originally based on the Roman law due diligence concept, akin to the French lawmakers, as section 0.2.2 of the introduction explained. Hence, there is no conflict between *general* due diligence and the *specific* corporate due diligence of the Supply Chains Act; rather, they apply in tandem.

In parallel to this Statute, the development of the case law shows some possibilities of seeking the responsibility of parent and procuring companies under tort law, besides the German Company Law (*Aktiengesetz*)<sup>525</sup>.

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522 *Ibid.*, Artikel 11.

523 See CSRD – Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting), see especially Article 1 amending article 19a (2) (a) (iii) and 29a (2) (a) (iii) of Directive 2013/34/EU; See CSDDD – Corporate Sustainability Due Diligence Directive (“Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence”), see especially Article 22. Subsection 2.3.2.3 addresses in more detail those European legislation.

524 Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, Drucksache 19/28649, 19. Wahlperiode, 19.04.2021, p 2: „Die Anforderungen sind international anschlussfähig und orientieren sich am Sorgfaltsstandard („due diligence standard“) der VN-Leitprinzipien, auf dem der Nationale Aktionsplan basiert.“

525 See, among others, German Supreme Court (*Bundesgerichtshof* (BGH)), Urteil vom 7.10.1975 – VI ZR 43/74; Wesche P and Ebert I, “Die UN-Leitprinzipien für Wirtschaft und Menschenrechte und Zugang zu Abhilfe – Ansätze für eine konsensorientierte Erweiterung der zivilrechtlichen Klagemöglichkeiten in Deutschland”, *Business and Human Rights Resource Center*, 2016 p 6 – 7; Wesche P and Saage-Maaß M, “Holding Companies Liable for Human Rights Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others

Plaintiffs have brought climate cases against large German carmakers on the basis of German tort law, relying on tort law, especially the duty of care under § 823 (1) BGB and the nuisance cause of action under § 1004 BGB<sup>526</sup>. So far, the first instance courts dismissed these cases, on merits grounds, deeming that claimants must tolerate infringements caused by defendants' GHG emissions<sup>527</sup>. While this opinion did not exclude the applicability of tort law to climate change in general, the first instance argued that the specific regulations (notably from the EU) already require the defendant to reduce its GHG emissions, rendering any judicial intervention through tort law unnecessary<sup>528</sup>.

### 1.3.3.5 General due diligence applicable to climate change, including between private persons

A prominent author in the field of German civil law literature (Wagner) denied the applicability of the BGB to climate change, primarily due to the cumulative character of climate change: "Converting the resulting global risk into tortious due diligence obligations of individual domestic operators of emission sources seems neither possible nor appropriate."<sup>529</sup> More recently, he even argued that "there is no individual obligation to limit one's own CO<sub>2</sub> emissions to the level that corresponds to the per capita share of the residual emissions available to achieve the 1.5 to 2 degree target"<sup>530</sup>.

The German Federal Constitutional Court seems to have contradicted this author. In its important decision on the German Climate Protection Act issued in 2021, the Court stated that the right to life and the right to private and family life are affected by climate change, including by the German government's conduct. To justify this, the Court noted that its

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v KiK", *Human Rights Law Review*, 2016 p 377-379; Saage-Maaß M, *Arbeitsbedingungen in der globalen Zulieferkette: Wie weit reicht die Verantwortung deutscher Unternehmen?* (Friedrich Ebert Stiftung November 2011).

526 See, for instance: *Barbara Metz (Deutsche Umwelthilfe e.V.) v Bayerische Motoren Werke (BMW) AG*, 21. September 2021. Similar complaints were brought against Volkswagen, Daimler, and Wintershall.

527 Court of First Instance of Brunswick (Landgericht Braunschweig), *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023, see especially p 12 and 15.

528 *Ibid*, p 19 - 20.

529 Wagner G, *BGB § 823 Schadensersatzpflicht, Münchener Kommentar zum BGB*, 8th ed, 2020 § 1055.

530 *Ibid*, § 1190.

case law and that of the ECtHR include protection against impairment by environmental pollution. In this regard, the Court explicitly referred to the following authorities of the ECtHR, being *Öneryildiz v Turkey*, *Budayeva and Others v Russia*, and *Cordella and Others v Italy*. It subsequently asserted that those rights also protect against climate-related threats<sup>531</sup>. Furthermore, the Court found that Article 20 of the German constitution, which protects future generations and the environment, imposes a special duty of care on the lawmaker<sup>532</sup>, and that the absence of specific and sufficiently ambitious GHG reduction targets for the period after 2030 violates this provision<sup>533</sup>. Consequently, the Court found these rights are applicable in climate matters.

Following the decision of the German Constitutional Court, applicants attempted to invoke this case law by bringing general tort claims against the largest car manufacturers in Germany<sup>534</sup>. However, the first instance court of *Braunschweig* argued in the case against Volkswagen that the European lawmakers already intervened specifically in the context of automotive vehicle emission standards, already requiring the defendant to reduce its GHGs<sup>535</sup>. Furthermore, the *Braunschweig* court stated that private due diligence cannot be more demanding than the State's duty to protect<sup>536</sup>. As the Constitutional Court had not previously identified a breach of the State's duty to protect, the State regulation of automotive vehicles can, in turn, not be in breach of this duty either<sup>537</sup>, nor can applicants request that private companies go beyond this based on general tort due diligence (see, for additional analysis, subsection 2.3.3.3).

As to the Stuttgart court, it similarly found that the EU lawmaker already intervened by implementing the EU regulation that sets emissions standards and ultimately forbids the sale of combustion cars by 2035<sup>538</sup>.

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531 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021, § 99.

532 *Ibid*, Headline 2.

533 *Ibid*, Headline 4.

534 See, for instance: *Barbara Metz (Deutsche Umwelthilfe e.V.) v Bayerische Motoren Werke (BMW) AG*, 21. September 2021. Similar complaints were brought against Volkswagen, Daimler, and Wintershall.

535 Court of First Instance of Brunswick (Landgericht Braunschweig), *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023, see especially p 19 - 20.

536 *Ibid*, p 18.

537 *Ibid*, p 26.

538 *Ibid*, § 25.

Nevertheless, these decisions do not rule out the applicability of *general* CDD if no specific law exists. Since no specific law, such as the CSDDD, explicitly governed the climate responsibility of parent companies of multinational corporations, it still seems arguable that tort law remained applicable in this context. In its final decision on the *RWE* case, the Hamm Court of Appeal gave a concurring opinion, arguing that general tort provisions remained applicable, even if other rules apply (note, however, that the Court ultimately dismissed this case due to evidentiary issues)<sup>539</sup>.

In any case, it cannot be ruled out that the judicial intervention by a higher court, as in the former proceedings against the State, leads to other outcomes. For example, the proceedings against the German State firstly failed before the first instance<sup>540</sup>, but then succeeded before the Constitutional Court<sup>541</sup>.

#### 1.3.3.6 No wrongful conduct needed to enforce CDD?

The German complaints against the private actors even invoke the “*Gefährdungshaftung*”, a form of objective liability for endangerment<sup>542</sup>.

As stated above, while, in principle, the three tort liability pillars must generally be met to establish liability (*Verschulden Rechtswidrigkeit, Kausalität*), an exception exists in cases of unlawful endangerment, as is the case in France<sup>543</sup>, and under common law countries<sup>544</sup>. Under these “strict liability” or “liability without fault” regimes, it is not necessary to establish

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539 Court of Appeal of Hamm, *Saül Luciano Lliuya v RWE*, Az. 5 U 15/17, 28 May 2025, p 60 – 65.

540 See Administrative Court of Berlin, *Family farmers v Germany*, (VG 10 K 412.18), 31 October 2019.

541 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021.

542 See for instance: Complaint in the case of *Deutsche Umwelthilfe e.V. v Bayerische Motoren Werke (BMW) AG* (2021) p 8-9, [https://admin.climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210920\\_14541\\_petition.pdf](https://admin.climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210920_14541_petition.pdf), last accessed 20 October 2025.

543 See, for instance : « la responsabilité sans faute du fait d'autrui », « les troubles du voisinage », « le régime des produits défectueux ». Some claimants argue in France that article 1252 of the French Civil Code also does not require the demonstration of wrongful conduct.

544 See, for instance the public and private nuisance legal bases, used in climate litigation in the USA.

the unlawfulness of the defendant's conduct or its fault<sup>545</sup>. The same applies to Section 1004 of the German Civil Code (the legal basis of the RWE case) and to the product liability regime<sup>546</sup>. Consequently, once the applicant has established the objective wrongfulness, the onus is on the defendant to exculpate itself, which some may interpret as a reversal or at least an alleviation of the burden of proof<sup>547</sup>.

However, the applicability of the objective liability figure *Gefährdungshaftung* requires, in principle, a *direct* infringement (*unmittelbarer Eingriff*) in the protected rights<sup>548</sup>. In cases of indirect infringements (*mittelbare Eingriffe*), establishing a breach of the standard of care is necessary according to notable authors of the legal literature<sup>549</sup>. It seems difficult to argue that climate harms *directly* interfere with the rights of individual persons since the contribution to global warming is cumulative, a “drop in the ocean” as some describe it<sup>550</sup>.

In any case, as it may still be necessary to prove a breach of the standard of care – or at least strategically wiser for the applicants at this stage of uncertainty –, German courts do not necessarily have to deal with each case individually if certain facts are acknowledged<sup>551</sup>. This would enable plaintiffs to rely on argumentative patterns similar to the “objective unlawfulness”. For instance, since it is scientifically established that GHGs contribute to the aggravation of global warming, and therefore, endanger furthermore the interests protected by section 823 BGB, it could be argued

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545 Staudinger A, “Vorbemerkung zu §§ 823–853” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2022), § 6.

546 The German Product Liability Law (*Produkthaftungsgesetz*) stems from Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (see the first recital).

547 Staudinger A, “§ 823” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2021), § 185.

548 Wagner G, *BGB § 823 Schadensersatzpflicht, Münchener Kommentar zum BGB*, 8th ed, 2020 § 7.

549 *Ibid.*, § 7; see as well Staudinger A, “§ 823” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2021), § 75.

550 Direct infringements in climate cases may only occur in legal systems that protect the environment and label anthropogenic global warming as a corresponding harm, as is the case in France in the *Notre Affaire à Tous et al v France* case (see subsection 2.3.1.1), which is not the case in Germany; or if non-physically climate-related climate harms occur, such as financial harms linked to the energy transition (for instance, fiduciaries which wrongfully managed climate-related financial risks).

551 Staudinger A, “§ 823” in Schulze and others (eds), *Bürgerliches Gesetzbuch, Nomos Kommentar* (11th edn, Nomos 2021), § 63.

that an *unreasonable* contribution to global warming is *objectively* unlawful<sup>552</sup>. The German Court of Appeals in Hamm also delivered a concurring opinion in this respect, arguing that in the climate realm, causation is physically linear despite the indirect nature of the infringement and the numerous causation chains<sup>553</sup>. The question in this context is then what is reasonable, and what is not<sup>554</sup>.

Subpart 2.3 on redressability assesses in much more detail the criterion of reasonableness, as well as the requests which must remain justiciable<sup>555</sup>.

### 1.3.4 CDD's existence in common law (Anglo-American)

Subsection 1.3.4.1 illustrates the Roman law origins of the duty of care in common law, its initial modern case laws, and its fundamental components. Subsection 1.3.4.2 discusses how the due diligence concept may be, theoretically, enforced in common law jurisdictions. Subsection 1.3.4.3 addresses the conditions to hold the government accountable under British and American law. Subsection 1.3.4.4 showcases the development of the duty of care in the field of multinational corporations in the UK, certainly the most advanced jurisdiction in this field in terms of case law, and its potential expansion in the other common-law countries, like the USA. Finally, subsection 1.3.4.5 argues that the general tort duty of care in common law applies to climate change.

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552 See corresponding opinion argued in the summons in *Deutsche Umwelthilfe v Bayerische Motoren Werke (BMW) AG*, 2021, p 7.

553 Court of Appeal of Hamm, *Saül Luciano Lliuya v RWE*, Az. 5 U 15/17, 28 May 2025, p 56.

554 Court of First instance of Stuttgart (Landgericht Stuttgart), 13.9.2022 – 17 O 789/2, § 25; Court of First instance of Brunswick (Landgericht Braunschweig), *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023.

555 Business freedom is a protected right in art 12 and 14 GG; or in the French constitution, and the European Treaties (See for instance Article 16 of the Charter Of Fundamental Rights Of The European Union, 2012/C 326/02, Preamble: “Article 16, Freedom to conduct a business: The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.”)

### 1.3.4.1 The origins and basic functions of the duty of care in common law

In common law jurisdictions, including in the USA, the concept of the duty of care<sup>556</sup> exists in tort law<sup>557</sup>, as in civil and international law systems.

Roman law has also influenced common law countries<sup>558</sup>. The main difference between common law and civil law jurisdictions is that the latter is derived from judicial decisions, whereas the former is based on statutory law<sup>559</sup>. In reality, however, the statutory foundations of civil law jurisdictions are quite vague and general, and their laws also undergo incremental development through jurisprudence, particularly with regard to their respective duties of care. In this regard, the differences do not seem significant.

Nonetheless, tort liability in common law countries developed with court decisions, instead of legislative interventions. Incrementally, common-law courts “found”<sup>560</sup> the laws of negligence, including the “duty of care”, or “vigilance”, or “diligence” outside of any contractual relationship as early as 1916<sup>561</sup> or even 1852<sup>562</sup> in the State of New York, especially by the prominent judge Cardozo. This development followed in 1932<sup>563</sup> in English and Scots

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556 According to a dictionary of common law definitions, “Care means watchful attention, prudence, diligence. Care is the opposite of negligence or carelessness and the amount of care to be exercised in a particular situation is determined by standard of conduct which may be expected from a person in that situation”, see <https://www.law.cornell.edu/wex/care>, last accessed 28 October 2025.

557 For the leading authority in jurisdictions governed by British jurisdictions, see UK House of Lords, *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 08 February 1990; for American jurisdictions, see the second and third restatement of torts.

558 British Institute for International and Comparative Law et al, “Study on due diligence requirements through the supply chain”, Final report, European Commission, January 2020, p 158. See as well Lewis A D E, Kiralfy A R and Glendon M A, “Common Law” (2023) *Encyclopedia Britannica*.

559 See as well definition of “common law” by the Cambridge online dictionary <https://dictionary.cambridge.org/dictionary/english/common-law>, last accessed 28 October 2025.

560 Cassell D, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence” (2016) *Business and Human Rights Journal* p 188.

561 New York Court of Appeals (Cardozo J.), *MacPherson v Buick Motor Co*, 217 NY 382, 24 January 1916. See also: New York Court of Appeals, *Palsgraf v Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

562 New York Court of Appeals, *Thomas v Winchester*, 6 N.Y. 397 (1852), July 1852.

563 UK House of Lords, *Donoghue v Stevenson*, [1932] AC 562, 26 May 1932.

law (in a previous case in 1883, only one judge out of three recognised the duty of care<sup>564</sup>).

In the UK, the leading case law on the duty of care is the *Caparo* case, which set out the three main criteria to develop the duty in novel cases: i) the damage must be foreseeable<sup>565</sup>; ii) a relation of “proximity” or “neighbourhood”<sup>566</sup> shall exist between the parties; and iii) it must be fair, just and reasonable to impose a duty of care<sup>567</sup>. In principle, a duty of care can be imposed with respect to actions and omissions, while the criteria concerning omissions may be more restrictive<sup>568</sup>.

Since the foreseeability and proximity criteria refer to the standard of care and to causation, they bear some resemblance to the French and German concepts of fault (*faute*; *Verschulden*) and causality.

The fair, just and reasonable conditions of the UK jurisprudence<sup>569</sup> are, as such, more specific criteria which do not necessarily exist in civil law traditions. However, it goes without saying that judges in other countries also aim to achieve justice by seeking fair and just outcomes. The reasonableness criterion is also present in civil law countries through the standard of the reasonable man standard or *bonus pater familias* (see above), which notably refers to the admissible conduct in light of the circumstances of the case. Furthermore, this criterion can also imply a best effort obligation or obligation of means, depending on the level of control over the source of the harm<sup>570</sup>. In any case, as with other legal systems, these criteria give the

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564 *Heaven v Pender*, [1883] 11 Q.B.D. 503.

565 According to a dictionary of legal definitions, “Foreseeability asks how likely it was that a person could have anticipated the potential or actual results of their actions”, see: <https://www.law.cornell.edu/wex/foreseeability>, last accessed 28 October 2025.

566 Lord Atkin introduced the condition of “neighbourhood” in the *Donoghue* case to introduce a “succinct yet workable concept [...which is also] simple, straightforward, yet containing moral and humanitarian overtones” (see Murphy J P, “Evolution of the Duty of Care” (1980) 30 *DePaul Law Review*. Note that the 10 commandments of the bible also use this word (translated to “prochain” in French or “Nächste” in German).

567 UK House of Lords, *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 08 February 1990.

568 UK House of Lords, *Bourhill v Young* [1942] UKHL 5, 05 August 1942 at p 88; For US case law, see New York Court of Appeals (Cardozo J.), *MacPherson v Buick Motor Co*, 217 NY 382, 24 January 1916; or New York Court of Appeal, *H. R. Moch Co. v Rensselaer Water Co.* - 247 N.Y. 160, 159 N.E. 896 (1928).

569 Note that the Canadian duty of care jurisprudence also foresees the public policy criterion.

570 For a concurring view, see Parance B and Groulx E, “Regards croisés sur le devoir de vigilance et le duty of care” (2018) 1 *Journal du droit international (Clunet)*.

courts significant discretion to settle cases and develop the duty of care in law.

It is important to note that some authors of the legal literature<sup>571</sup> and Lord Bridge, a former judge of the UK House of Lords (thereafter, the UKHL, which was the former UK Supreme Court), criticised the vagueness and the subjectivity of the *Caparo* factors:

“[I]t is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.”

In order to limit the amount of discretion to the judges and a potential widespread uncontrolled development of the duty of care, the majority in *Caparo* gave a preference to analogies and the importance of the precedent by referring to the opinion of Judge Brennan of the High Court of Australia:

“Of course, if foreseeability of injury to another were the exhaustive criterion of a prima facie duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification — perhaps a qualification of the kind stated in the second stage of the general proposition in *Anns* [1978] AC 728. I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.’”

Thereby, the UKHL seemed to favour the incremental development rather than a principle-based approach<sup>572</sup>, once considered by the UKHL in the

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571 For a concurring view, see Professor Cassel D, Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence, *Business and Human Rights Journal*, 21 April 2016, p 194.

572 UK House of Lords, *Anns v Merton London Borough Council*, 73 [1978] AC 751–2: “[T]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.

1978 *Anns v Merton London Borough Council* case, but later abandoned by the UK courts afterwards (although it is still followed by the Canadian jurisprudence). Professor Doug Cassel concurs with this view concerning the manner in which common law evolves, both concerning the creation of new causes of action<sup>573</sup>, and the application of the duty of care or other laws to new situations, referring again to the opinion of Justice Cardozo:

“Generally it is the nature of the common law to move slowly and by accretion; swift and massive movements are not impossible, but they are relatively rare.’ (Note 66: Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921, p 24). More common is a far lesser step: judicially recognizing new applications of existing principles or precedents.”<sup>574</sup>

Nevertheless, common-law courts can also establish and develop general common law if there is a need to do so, particularly if lawmakers have not created any rule, as recognised by the US Supreme Court in the climate case *American Electric Power Company v Connecticut*:

“Environmental protection is undoubtedly an area “within national legislative power,” one in which federal courts may fill in “statutory interstices,” and, if necessary, even “fashion federal law.” *Id.*, at 421–422. As the Court stated in *Milwaukee I*: “When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”<sup>575</sup>

Thus, given the existence of a tort duty of care in common law countries, it should also apply to climate change, as it does in other legal systems.

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Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

573 A cause of action is “the grounds (such as violation of a right) that entitle a plaintiff to bring a suit”, see <https://www.merriam-webster.com/dictionary/cause%20of%20action>, last accessed 28 October 2025.

574 Cassel D, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence” (2016) *Business and Human Rights Journal* p 189.

575 SCOTUS, *American Electric Power Company v Connecticut*, 564 U. S. \_\_\_\_ (2011), p 6.

### 1.3.4.2 The possibility of seeking preventative enforcement of due diligence through injunctions

Common law courts regularly issue injunctions to prevent “private or public nuisances”<sup>576</sup>, which typically involve encroachment of private properties or public land. In the relatively recent nuisance case called *Coventry*, the UK Supreme Court stated “that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not.”<sup>577</sup>

In their book on Tort Law, Simon Deakin and Zoe Adams state that, according to the *Miller v Jackson* case, an injunction “applies to intentional or continuing acts, so it has no application to negligence”<sup>578</sup>. However, they do not explain why the law of negligence could not encompass continuing acts. This is problematic to some degree, as a CDD breach is usually committed over a period of time (see Part 3 on historical ongoing responsibility). Furthermore, although the Court denied the injunction in *Miller v Jackson*, this does not set a precedent for the general impossibility of providing injunctions in negligence cases, as the Court’s reasoning appears to be restricted to the specific circumstances of this case.

The nuisance cause of actions provides an avenue to litigate environmental issues<sup>579</sup>. Therefore, this avenue could be used alongside negligence to bring a climate claim, as has been done in the USA in over a dozen cases against multiple carbon majors<sup>580</sup>, or as in New Zealand in the *Smith v Fonterra* case. Interestingly, the New Zealand Supreme Court deemed the *Smith* case admissible in 2024 and further argued that nuisance and negligence laws have similar criteria<sup>581</sup>.

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576 Deakin S and Adams Z, *Markesinis and Deakin’s Tort Law* (8th edn, Oxford University Press 2019) p 434–437.

577 UK Supreme Court, *Coventry v Lawrence*, [2014] UKSC 13, 26 February 2014, § 121.

578 Deakin S and Adams Z, *Markesinis and Deakin’s Tort Law* (8th edn, Oxford University Press 2019) p 871 referring to *Miller v Jackson* [1977] QB 966, 680 (per Lord Donning MR).

579 Deakin S and Adams Z, *Markesinis and Deakin’s Tort Law* (8th edn, Oxford University Press 2019) p 447.

580 Sabin Center for Climate Change Law, *Global Climate Litigation Report 2020 Status Review* (UN Environment Programme 2020) p 22.

581 Supreme Court of New Zealand, *Smith v Fronterra et al*, SC 149/2021 [2024] NZSC 5, 2024, § 172 - 175.

It is, however, unclear whether the nuisance cause of action requires the demonstration of a breach of duty of care<sup>582</sup>. While courts sometimes require it, nuisance cases primarily focus on the damage caused by the nuisance itself, rather than on wrongful conduct. An author in the literature heavily criticised the nuisance causes of actions for their lack of dogmatic definition and their confusion surrounding the need to establish negligent conduct or not<sup>583</sup>. In that sense, the nuisance law is similar to Section 1004 of the German Civil Code (BGB), which also allows for injunctions to stop harm to property (or other legal interests of Section 823 BGB) and which does not, in principle, require a breach of a duty of care.

The international arbitral award in the *Trail Smelter* case further illustrates the confusion between negligence and nuisance, and the uncertainty over whether a breach of the standard of care is necessary to prove nuisance<sup>584</sup>. In fact, while the award quoted decisions of the US Supreme Court on nuisance, it was based on the international due diligence rule of not causing harm to other States<sup>585</sup>. This confusion may stem from misunderstandings surrounding the notions of duty of care or due diligence. Since they can apply to unregulated activities, some lawyers do not consider them to be a legal obligation, but rather a purely voluntary standard. Nonetheless, the whole purpose of the duty of care is to regulate lawful activities.

In any case, injunctions are possible under common law, either by relying on the nuisance cause of action or negligence. Given the uncertainty around the need to demonstrate a breach of a standard of care, it seems strategically wiser for the plaintiffs to do so should the Court deem its demonstration necessary, including in nuisance cases.

#### 1.3.4.3 The development of the duty of care of parent companies in the UK case law

The UK courts have significantly developed the law of negligence in the context of cases directed against parent companies of multinational groups.

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582 Deakin S and Adams Z, *Markesinis and Deakin's Tort Law* (8th edn, Oxford University Press 2019) p 439.

583 Merrill T W, "Is Public Nuisance a Tort?" (2011) 4(2) *Journal of Tort Law*.

584 *Trail Smelter*, III UN Reports of International Arbitral Awards, 1905 (1941).

585 *Ibid*, p 1965.

If parent companies control their subsidiaries and determine the implementation of their policies, or if they have superior knowledge, courts can impose a duty of care on them, even if the harm was ultimately caused by foreign subsidiaries, and even if it occurred overseas (see consolidated case law in this respect: *Connelly v RTZ Plc*<sup>586</sup>, *Lubbe v Cape Plc*<sup>587</sup>, *Chandler v Cape Plc*<sup>588</sup>, *Lungowe v Vedanta*<sup>589</sup>, *AAA v Unilever Plc*<sup>590</sup>, *Okpabi and others v Royal Dutch Shell Plc and another*<sup>591</sup>. The UK Supreme Court notably recently affirmed that:

“Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.”<sup>592</sup>

Cassel, Professor of law in the USA, stated that these legal developments in the UK could also occur in other common law jurisdictions, including in the USA, since the duty of care factors are similar, if not the same<sup>593</sup>. While he referenced the case law of the Supreme Court of California to support his point, this thesis shares in principle his view by referring to the aforementioned Cardozo opinions.

Furthermore, Cassel argues that “[t]he time is ripe for common law courts to enforce the now widely recognized human rights responsibilities

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586 UK House of Lords, *Connelly v RTZ Plc* [1998] AC 854, 24 July 1997, § 27.

587 UK House of Lords, *Lubbe and Ors v Cape Plc* [2000] UKHL, 20 July 2000, § 17.

588 UK Court of Appeal (London), *Chandler v Cape Plc* [2012] EWCA Civ 525, 25 April 2012, § 80.

589 UK Supreme Court, *Lungowe v Vedanta*, [2019] UKSC 20, 10 April 2019, § 53.

590 UK Court of Appeal, *AAA v Unilever Plc & Anor*, [2018] EWCA Civ 1532, 04 July 2018, § 37.

591 UK Supreme Court, *Okpabi and others v Royal Dutch Shell Plc and another*, [2021] UKSC 3, 12 February 2021, refers to *Lungowe v Vedanta* (§ 53 quoted just above); see as well § 147.

592 UK Supreme Court, *Lungowe v Vedanta*, [2019] UKSC 20, 10 April 2019, § 53 and 88.

593 Cassell D, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence” (2016) *Business and Human Rights Journal* p 199.

of business enterprises to exercise human rights due diligence.”<sup>594</sup> While this dissertation believes this would be a welcome development, it must be stressed that HRDD as developed by John Ruggie in the UNGPs (see introduction) is still different from the common law duty of care to various degrees, as (i) HRDD concerns all human rights not only rights protected by tort-law ; (ii) HRDD must in principle be exercised constantly towards all subsidiaries and suppliers even if no relation of proximity exists as interpreted by the UK courts. The main difference is that HRDD expects some degree of diligence in proportion to the degree of control or mere influence, whereas, for UK courts, “control is just a starting point”. More precisely:

“The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent.”<sup>595</sup>

To reconcile HRDD and the tort duty of care, Cassel proposes to “hold parent companies responsible only for the foreseeable consequences of their own failures to exercise due diligence with regard to the enterprises over which they have control or effective leverage.”<sup>596</sup> Either way, the existing duty of care of parent companies bears similarities with HRDD and the *general* due diligence forms from civil law countries<sup>597</sup>. The similarity might increase in the future or receive legislative validation through new statutory duties, as in France, Germany or on the EU level (see, respectively, the French Duty of Vigilance Law, the German Supply Chains Act, and the CSDDD mentioned in the preceding subsections).

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594 *Ibid*, 180.

595 UK Supreme Court, *Okpabi and others v Royal Dutch Shell Plc and another*, [2021] UKSC 3, 12 February 2021, § 147.

596 Cassel D, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence” (2016) *Business and Human Rights Journal* p 181.

597 Parance B and Groulx E, “Regards croisés sur le devoir de vigilance et le duty of care” (2018) 1 *Journal du droit international (Clunet)*.

### 1.3.4.4 Discussion of climate-related case law

#### 1.3.4.4.1 In the UK

In the UK, tort law formerly governed State responsibility.

However, since the UK enacted the 1998 Human Rights Act, which transposed the Convention Rights in the domestic system, it created a contained regime that limits the ECHR's influence on the common law and prevents substantive adaptations of the duty of care to the requirements set by the ECtHR<sup>598</sup>. Still, the ECHR remains applicable in the UK, including the due diligence standard to oversee compliance with the positive obligations of the Court<sup>599</sup>.

In addition, judicial reviews are possible in the UK, similar to *ultra vires* legal recourse in other European jurisdictions, such as the *recours en excès de pouvoir* in France. These reviews may result in an order to quash (annulment) if the authorities have erred in law.

For example, in the climate case *Friends of the Earth UK, Client Earth, and Good Law v UK*, the applicants succeeded in establishing that the UK authorities failed to implement Sections 13 and 14 of the UK Climate Change Act<sup>600</sup>. Consequently, the High Court of London granted the requested declaratory order (i.e., the claimants did not seek a quashing order in this case). While the applicants also submitted violations of the ECHR, as they are allowed to do so in judicial proceedings, the court ruled that it was preferable to wait for the outcome of the pending climate cases before the ECtHR rather than establish domestic standards that departed too heavily from the incremental development of Strasbourg case law (see

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598 Cassell D, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" (2016) *Business and Human Rights Journal* p 195 referring to *Chief Constable of the Hertfordshire Police v Van Colle* [2009] 1 AC 225 paras 82 (Lord Hope) and 136 (Lord Brown). Also see: Stoyanova V, "Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights", *The International Journal of Human Rights*, 24(5), 2020, pp 632–655.

599 For more analysis on this issue, see, among others, Stoyanova V, "Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights", *The International Journal of Human Rights*, 24(5), 2020, pp 632–655.

600 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022, § 20 and 279.

subpart 3.3 on redressability for expanded discussion in this regard<sup>601</sup>). More generally, regarding the binding effect of the ECHR, a declaration of incompatibility may be issued if legislation violates the ECHR<sup>602</sup>. However, quite surprisingly, these declarations do not bind the UK authorities<sup>603</sup>. Otherwise, British courts can issue mandatory orders and injunctions based on domestic law<sup>604</sup>.

It is not possible to infer clear analogical applicability of the tort of negligence or other causes of action from the successful climate case in the UK (*Friends of the Earth, Client Earth and Good Law Project v UK*<sup>605</sup>). This application for judicial review succeeded thanks to findings regarding breaches of *specific* statutory provisions<sup>606</sup>. The applicants did not need to fulfil any conditions relating to the duty of care in negligence cases: they did not need to show the foreseeability of the harm, nor the proximity between the parties (or causation), nor the reasonableness of the duty. Moreover, the judge dismissed the plea concerning the applicability of the ECHR. Thus, this judgment does not permit analogical reasoning to establish the existence of *general* CDD under tort or human rights law in the UK.

However, this case does not provide any opposite evidence either. In reality, since the UK adopted the Climate Change Act – the legal basis of the abovementioned successful case – to comply with the Paris Agreement and the UNFCCC, and more broadly with international *general* CDD, it is reasonable to conclude that the legislator attempted to implement CDD in the UK, as this dissertation postulated in the introduction (see the difference between *general* and *specific* CDD laid out in section 0.1 and 0.4.1).

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601 *Ibid*, § 261 - 279.

602 Judiciary For England And Wales, The Administrative Court: Judicial Review Guide 2021, July 2021, p 65, § 12.6.1.

603 *Ibid*, p 65, 12.6.4.

604 *Ibid*, p 66, § 12.6.1.

605 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022, § 13

606 More specifically, the Court recognised a failure to comply with the duty to “prepare such proposals and policies” to meet the carbon budgets which have been set under the CCA 2008 (section 13), and a failure to report to the Parliament in this regard; see High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022.

Furthermore, in light of the ECtHR's climate decision in *KlimaSeniorinnen*, it will be necessary to assess whether the domestic measures comply with the Court's standards. It will be equally interesting to consider the influence of the international advisory opinions of the ITLOS and the ICJ on British courts.

#### 1.3.4.4.2 In the USA

In the USA, the federal government – and/or its agencies – may be held accountable in tort.

The first-ever climate case, which also succeeded, was in the USA in the 2007 *Massachusetts v EPA* case, in which the Supreme Court ruled that the EPA has a duty to regulate GHGs. Since the Clean Air Act obliges the EPA to regulate air pollutants if they endanger the public health or welfare, the Court found that the EPA must decide whether GHGs do constitute this kind of threat<sup>607</sup>. The reasoning following which the EPA must protect the public, including the plaintiffs, against climate-related harm, also seems valid for any other private persons in a position to influence significant volumes of GHGs, since they do not have the right to harm others either. Therefore, this reasoning equally alludes to a *general CDD* recognition in the USA.

However, in *American Electric Power Company v Connecticut*, the US Supreme Court asserted that the Clean Air Act displaces federal tort law<sup>608</sup>, meaning that it is a *lex specialis* (this case is discussed in more detail in section 2.3.1). Nevertheless, *general* tort law and due diligence remain in principle the basic rule applicable by default, meaning that all other areas not regulated by the Clean Air Act should remain under their scope, such as parent companies' responsibility over worldwide GHG emissions. Despite this potential and theoretical applicability of due diligence to climate change under those circumstances, there is little hope that the US federal justice system will recognise *general CDD*, particularly since Trump's first mandate<sup>609</sup>.

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607 SCOTUS, *Massachusetts v EPA*, 549 U. S. \_\_\_\_ (2007).

608 SCOTUS, *American Electric Power Company v Connecticut*, 564 U. S. \_\_\_\_ (2011).

609 Totenberg N, "The Supreme Court is the most conservative in 90 years", *NPR*, July 2022.

Actually, even before Trump's first term in office, other federal courts had previously deemed cases against numerous private corporations based on federal tort law to be nonjusticiable due to the political question doctrine<sup>610</sup>.

In other climate cases based on the US Federal Constitution and its corresponding human rights dimensions, plaintiffs have been equally unsuccessful so far. In *Juliana v USA*, some plaintiffs relied on constitutional provisions mandating the federal government and lawmakers to protect life and property (the Fifth and Fourteenth Amendments to the Constitution<sup>611</sup>, similar to the legal bases relied on in *Urgenda*). The Court of Appeals dismissed their case for lack of redressability, in the sense of lack of judicial authority to grant the desired measures, due to their far-reaching but also non-consensual nature (see section 2.3.2 for further information)<sup>612</sup>. The US Supreme Court declined to hear this case. The chances of another suit of this kind succeeding at the federal US level seem rather low, even with a "reasonable" interpretation of *general* CDD in line with international consensus, as long as the SCOTUS composition remains as "conservative" as it was in 2024<sup>613</sup>. This view is supported by the SCOTUS decision in *Dobbs v Jackson*, in which the Court upheld a state law despite it conflicting with its previous interpretations of the Constitution and the doctrine of precedent (so-called *stare decisis*), a pillar of common law.<sup>614</sup> This decision, in addition to *West Virginia v EPA*, shows the willingness of the SCOTUS to grant the lawmaking bodies final authority on important societal issues, including climate mitigation.

Having said that, the US federal courts can still, in theory, provide for judicial review to ensure the authorities' actions are not "arbitrary,

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610 Court of Appeal for the Ninth Circuit of the United States, *Native Village of Kivalina v ExxonMobil et al*, No. 09-17490, D.C. No. 4:08-cv-01138-SBA, 21 September 2012.

611 The use of the "due process clause" by the plaintiffs is similar to the duty of care or due diligence. Tracing this parallel and proximity of the terms under US constitutional law was also done by authors of the legal literature: Crowell J, "Duties of Care and the Constitution: A Negligence Model of Individual Rights" (2003) 21(2) *Yale Law & Policy Review* p 493. The plaintiffs in *Juliana* also relied on the principle of the "public trust" doctrine imposing on the State the obligation to protect natural resources and the atmosphere, see for further analysis: Blumm MC and Wood MC, "No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine" (2017) 67 *American University Law Review* 101.

612 Court of Appeal for the Ninth Circuit of the United States, *Juliana et al v USA*, No. 18-36082 D.C. No. 6:15-cv-01517-AA, 17 January 2020, Opinion of the Court.

613 Totenberg N, "The Supreme Court is the most conservative in 90 years", *NPR*, July 2022.

614 SCOTUS, *Dobbs et al v Jackson et al*, 597 U. S. \_\_\_\_ (2022).

capricious, . . . or otherwise not in accordance with law.”<sup>615</sup> In a US climate case directed against the EPA’s actions, the Court of Appeals concluded that the 2019 *Affordable Clean Energy* Rule of the Trump Administration, replacing the Obama administration’s *Clean Power Plan* was, for example, a “fundamental misinterpretation’ of the Clean Air Act<sup>616</sup>. However, as already pointed out just above, this case and others ended up before the US Supreme Court in 2022 in *West Virginia v EPA*. The Supreme Court rather found that Obama’s *Clean Power Plan* contravenes the “major questions” doctrine, which obliges the legislator to step in, as the Court considered the Statute not sufficiently clear to provide the EPA (i.e. federal regulator) with a mandate of this kind (see subpart 2.3 on the redressability)<sup>617</sup>. Nevertheless, it is important to acknowledge the somewhat contradictory nature of the US Supreme Court’s recent jurisprudence, given that it ruled in the 2007 Massachusetts case that the EPA had a duty to position on the issue of whether or not GHGs are dangerous pollutants.

In any case, the situation in US federal courts does not prevent climate lawsuits from being filed in US state courts, including based on state tort law, provided the claims are not displaced by *lex specialis* on the federal or state level. At the time of writing this thesis, there were thirty climate lawsuits seeking the responsibility of private companies, especially oil and gas companies, for deception and misleading statements, which were still pending in US state courts<sup>618</sup>. These lawsuits could arguably fall under the *general* CDD category. One state-level supreme court recognised its jurisdiction without further limitation, and the US federal Supreme Court, SCOTUS, will review one of these decisions. Furthermore, in December 2024, the Supreme Court of Montana granted a climate-related request in the *Held v Montana* case<sup>619</sup>. It will be interesting to see how those US state courts will position themselves on climate, especially after the international law clarifications by the ICJ, among others.

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615 See, for instance, the Clean Air Act’s provisions: 42 U. S. C. §7607(b)(1).

616 Court of Appeals for the District of Columbia, *American Lung Association v EPA*, No. 19-1140, January 19, 2021.

617 SCOTUS, *West Virginia et al v EPA*, 597 U. S. \_\_\_\_ (2022); Court of Appeals for the District of Columbia, *American Lung Association v EPA*, No. 19-1140, January 19, 2021, p 146.

618 Setzer J and Higham C, *Global Trends in Climate Change Litigation: 2023 Snapshot* (Grantham Research Institute and Centre for Climate Change Economics and Policy, LSE 2023) p 4.

619 See Supreme Court of The State of Montana, *Held et al v Montana et al*, DA 23-0575, 18 December 2024.

Despite some courts currently being reluctant to provide climate protection, this subsection shows that *general* due diligence norms enshrined in tort law, human rights law, or the respective constitutions should – in theory – apply to climate and public and private actors to mitigate climate change in common law countries, particularly if no specific legislation is in place. Furthermore, since *specific climate legislation* is merely a form of implementation of *general* CDD, it *theoretically* needs to comply with *general* CDD enshrined in constitutional CDD<sup>620</sup> (including human rights) and international law<sup>621</sup>, given the hierarchy of norms. It will be interesting to see how the recent unanimous international advisory opinions of the ITLOS and ICJ can influence the position of US courts, which have asserted that climate action and mitigation are legal questions, and that States have a due diligence duty to limit global warming to 1.5°C<sup>622</sup>.

#### 1.3.4.4.3 In other common-law countries

In Ireland, the Supreme Court granted a climate-related case against the State to remedy statutory breaches<sup>623</sup>. However, it dismissed the claims based on human rights. And there were no tort law claims.

Beyond those case laws in the UK and USA, the Supreme Court of New Zealand declared a general tort law climate case admissible in 2024, in

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620 Note however that federal Courts dismissed the *Juliana v USA* case based on general CDD enshrined in the US Constitution (right to life and property, akin to Urgenda). While this dismissal was certainly due to certain particular aspects of the interpretation of general CDD by the plaintiffs (see its analysis in subsection 2.3.2.2.), the prospects of success of such a type of case, even with more reasonable interpretation of general CDD, remain very low in US federal courts as long as the SCOTUS composition remains as “conservative” as nowadays, as notably evidenced by its decision in *Dobbs v Jackson* in which the Court gave prevalence to a state law which breached its own (former) interpretation of the Constitution concerning the right to abortion.

621 See, notably, ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024, see especially: § 405: “Their implementation depends on the relevant domestic legal system and allows for the exercise of discretion. However, States do not have absolute discretion with respect to the action that is required.”

622 ITLOS, *Advisory Opinion on Climate Change and International law*, 21 May 2024, § 104; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, § 38 – 43.

623 Supreme Court of Ireland, *Friends of the Irish Environment v The Government of Ireland*, 31 July 2020.

which it found a potential existence of *general* CDD in this case<sup>624</sup>. This case is even more interesting since the respondent is a private party. One cannot exclude that other common-law courts may consider and follow similar reasoning.

In Canada, the Court of Appeal required the State in *Mathur v Ontario* to comply with human rights in 2024<sup>625</sup>, which the Supreme Court declined to review in 2025.<sup>626</sup> This case also shows the recognition of *general* human rights CDD by Canadian courts.

On the other hand, the Federal Court of Australia held in 2025 that the law of negligence does not capture climate action, due to the political nature of the questions involved:

“The Commonwealth did not and does not owe Torres Strait Islanders the alleged duty of care concerning the setting of emissions reduction targets. For the reasons given in detail earlier, that duty of care cannot or should not be imposed or imputed because it would be both inappropriate and impractical for the Court to pass judgment on the reasonableness of the Commonwealth’s actions concerning the setting of emissions reduction targets. That is because they involve issues of high or core government policy and political judgment which properly fall within the province of the elected representatives and executive government of the day, not the judicial arm of government.”<sup>627</sup>

This latter case shows that there is still no clear unified trend in climate case-law in common-law countries. However, the ingredients are there to trigger evolutions in the direction of finding due diligence norms applicable to climate change.

#### 1.3.4.4.4 Interim conclusion

While the developments in Part 1 demonstrate that the concept of due diligence manifestly applies to climate change in all the legal systems as-

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624 Supreme Court of New Zealand, *Smith v Fronterra et al*, SC 149/2021 [2024] NZSC 5, 2024.

625 Court of Appeal of Ontario, *Mathur v Ontario*, 2024 ONCA 762, 2024.

626 Setzer J and Higham C, *Global Trends in Climate Change Litigation: 2025 Snapshot* (Grantham Research Institute on Climate Change and the Environment, LSE 2025) p 26.

627 Federal Court of Australia, *Pabai v Commonwealth of Australia*, (No 2) [2025] FCA 796, 2025, § 977.

sessed so far (international law, human rights law, civil law systems), this dissertation considers, at this stage of the demonstration, that the same should be true of common law jurisdictions.

Nonetheless, case law developments in those jurisdictions are more complex and ambiguous than in French or German law. In fact, despite some successful climate cases based on *specific* Statutes in the USA, Ireland, and Great Britain, the courts in those countries still refuse to apply the general duty of care to climate change, due to the *lex specialis* rule or the political feature of climate action. The reluctance of common-law courts to grant mitigation requests on the basis of *general* CDD makes the assertion regarding the existence of *general* CDD somewhat speculative<sup>628</sup>.

However, the effect of the *lex specialis* rule is limited. It does not rule out the application of general due diligence norms where no specific legislation exists. Moreover, human rights and international jurisprudence should influence the domestic courts' positions. The ECtHR's decision in *KlimaSeniorinnen v Switzerland* clearly affirms that the State's conduct in climate mitigation concerns is subject to the Court's judicial review. The ECtHR decisions bind the UK and Ireland. Moreover, both the ICJ and ITLOS affirmed that climate action falls within their competences, as they are legal matters requiring States to exercise due diligence obligations, which can lead to secondary obligations in case of non-compliance. Although these opinions do not bind domestic law, the due diligence legal bases interpreted by international courts bear much resemblance to the domestic tort duties of care. It will therefore be interesting to see whether these opinions influence the stance of certain common law courts.

Either way, beyond this deductive reasoning from existing climate judgments, the next subdivision analyses the applicability of the *general* common law duty of care to climate matters in greater theoretical depth.

#### 1.3.4.5 Discussion of general CDD's applicability based on the duty of care criteria

To discuss the applicability of CDD in a more theoretical way, this subdivision follows the so-called "*Caparo*" factors (applicability criteria found

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628 For an opinion agreeing on the applicability of the duty of care in the climate context, see Varvastian Samira and Kalunga Felix, "Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe*", *Transnational Environmental Law*, 2020, pp 16–21.

in the *Caparo* case, being i) foreseeability, ii) proximity, and iii) neighbourhood). While climate-related damages are now clearly foreseeable (see introduction and above, subsection on international law), it is debatable whether there is a relation of “proximity” or “neighbourhood” between climate-related victims and greenhouse gas contributors.

According to the foundational case law for negligence, there is a constant neighbourhood relationship between a manufacturer and a consumer, irrespective of whether the product was sold by the manufacturer or not (see *Donoghue v Stevenson* and *Thomas v Winchester*). These rulings mean that a consumer who is a victim of a defective product will remain in a neighbourhood relationship with the manufacturer, even if the product was passed on to a distributor and a storekeeper before reaching the ultimate consumer. This example shows that there is no need for the parties to be in geographical proximity, but rather there needs to be a foreseeable causal link<sup>629</sup>.

Beyond the special relationship between a manufacturer and a consumer, “[w]hile there is authority for the proposition that one owes a duty to the world at large to refrain from conduct creating an unreasonable risk of injury to others”<sup>630</sup>, there can be no “liability in an indeterminate amount for an indeterminate time to an indeterminate class” according to the New York Court of Appeal (presided by Justice Cardozo) in *Ultramares*. Correspondingly, a company auditor is not responsible for the loss incurred by new investors if they rely on its auditing reports for an investment decision in a new company. Remarkably, the leading case law on the duty of care in the UK (*Caparo*) involved similar facts and produced similar legal findings. In *Moch*, the NY Court of Appeal (Cardozo) ruled that a water utility company is not liable for property damage caused by fire if the fire was caused by external factors, despite the plaintiff’s allegations that the fire could have been extinguished with normal, adequate water pressure<sup>631</sup>. In the USA, the Second Restatement of Torts (codification attempts of the case law) states more generally “that there was no general duty to exercise reasonable care with regard to another if that exercise involved the necessity of taking

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629 See for concurring opinion: Cassell D, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence” (2016) *Business and Human Rights Journal* p 199, referring to *Donoghue v Stevenson*, 581.

630 *Stevenson* Harvey G, *Law of Negligence in the Atlantic States*, 1954.

631 New York Court of Appeal, *H. R. Moch Co. v Rensselaer Water Co.* - 247 N.Y. 160, 159 N.E. 896 (1928).

positive action.”<sup>632</sup> There are however exceptions to this rule<sup>633</sup>, if there is a special relationship, as omissions may also characterise breaches of the duty of care, including in the relationship between a parent and a subsidiary, as seen above in subdivision 1.3.4.3.

In the situation of climate change, there are no previous contractual arrangements; every GHG aggravates further climate change and globally contributes to climate-related harms. Clearly, one climate-related victim cannot sue all GHG contributors to receive compensation for obvious practical reasons. However, various climate-related plaintiffs could ensure that everyone – especially the systemic actors such as States and business enterprises – enact the appropriate measures to adequately mitigate climate change as it benefits the world at large. So, is it possible to seek injunctive relief against one or more GHG contributors under common law?

The question of whether – or, rather, the extent to which – common-law courts may issue injunctions to cease climate misconduct is complex. As discussed above, it is unclear whether the law of negligence covers ongoing activities such as GHG emissions and allows for injunctions<sup>634</sup>. In any case, the nuisance cause of action allows for injunctions and applies to environmental matters alongside continuing harmful conduct over time. Therefore, climate applicants should be able to claim a nuisance alternatively to negligence to ensure tort law applies. The Supreme Court of New Zealand admitted in 2024 a tort case against private companies based on those two laws<sup>635</sup>. Other common-law courts may follow similar reasoning.

Regarding the conditions for granting injunctions, the UK Supreme Court stated in the 2014 nuisance *Coventry* case, “that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not.”<sup>636</sup> The question is whether the injunction is a more adequate, fair and just remedy than damages, declaratory relief, or the dismissal of the claims. Furthermore, in previous non-climate cases, British courts have denied a mandatory injunction if providing compensation for the potential damage is less expensive for the

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632 Section 314 of Topic 7 entitled “Duties of Affirmative Action”.

633 Murphy J P, “Evolution of the Duty of Care” (1980) 30 *DePaul Law Review* p 157.

634 Van Boom W H, “Comparative Notes on Injunction and Wrongful Risk-Taking”, *Maastricht Journal of European and Comparative Law*, 17(1), 2010, p 16.

635 Supreme Court of New Zealand, *Smith v Fronterra et al*, SC 149/2021 [2024] NZSC 5, 2024, § 172 - 175.

636 UK Supreme Court, *Coventry v Lawrence*, [2014] UKSC 13, 26 February 2014, § 121.

respondent<sup>637</sup>. Finally, according to a comparative lawyer, British courts grant a court order if it is implementable and if there is a prospect of serious and irreversible harm, whether it is imminent or ongoing.<sup>638</sup>

In the realm of climate change, it is necessary to limit global warming as much as possible in order to remain on a habitable planet and to minimise loss and damage. According to the IPCC, “hard adaptation limits” will increase if warming further increases<sup>639</sup>. Moreover, further GHG reductions are urgent to avoid crossing the 1.5°C threshold, which is almost imminent and would have extremely serious consequences. Either way, mitigation remains an overarching priority, even if the 1.5°C threshold is exceeded. These scientific findings support the granting of the injunction.

Furthermore, everybody needs to mitigate global warming. This principle that everyone needs to do their part concords with the physical and mathematical reality of every emission reduction count, even if one contribution does not seem significant in proportion. This tenet has been recognised by the US Supreme Court in *Massachusetts*<sup>640</sup>, the Dutch Supreme Court in *Urgenda*<sup>641</sup>, the German Constitutional Court with respect to its climate law<sup>642</sup>, or the Hague District Court with respect to a private company, *Shell*<sup>643</sup>.

British courts also engage in a balancing of interests, including by considering the rights of the public, to make sure the injunction does not curtail the rights of others<sup>644</sup>. More precisely, the UK Supreme Court considers whether the activity potentially affected by the injunction is lawful, permitted by public authorities, and/or even beneficial to the public<sup>645</sup>.

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637 Van Boom W H, “Comparative Notes on Injunction and Wrongful Risk-Taking”, *Maastricht Journal of European and Comparative Law*, 17(1), 2010, p 16 referring to *Redland Bricks Ltd. v Morris*.

638 *Ibid*, p 14 – 15.

639 IPCC, AR 6, WG II, SPM, § B.3, B.5 and C.3.

640 SCOTUS, *Massachusetts v EPA*, 549 U. S. \_\_\_\_ (2007), p 22.

641 Supreme Court of the Netherlands, *Urgenda*, 19/00135, 20 December 2019, § 6.3.

642 Constitutional Court of Germany, 1 BvR 2656/18, 24 March 2021, § 99.

643 District Court of The Hague, *Milieudefensie v Shell*, 26 May 2021, C/09/571932 / HA ZA 19-379, § 4.4.49.

644 Lord Justice Cumming-Bruce stated in *Miller v Jackson* that “[t]here is authority that in considering whether to exercise a judicial discretion to grant an injunction the court is under a duty to consider the interests of the public.” ; *Kennaway v Thompson* [1981] QB 88; *Coventry v Lawrence*, [2014] UKSC 13, 26 February 2014, § 125; Van Boom W H, “Comparative Notes on Injunction and Wrongful Risk-Taking”, *Maastricht Journal of European and Comparative Law*, 17(1), 2010, p 16.

645 UK Supreme Court, *Coventry v Lawrence*, [2014] UKSC 13, 26 February 2014, § 125.

This balancing act poses a particular challenge in climate cases, as many, if not all, emitting activities, ranging from industrial activities to the use of automotive vehicles, are already regulated by public bodies, allowed or even promoted and to some extent beneficial to the public. These factors present significant challenges when it comes to devising any *specific* substantive injunction in the climate realm that is adequate, reasonable, and proportionate. In contrast, procedural injunctions are manifestly easier to grant (i.e. implementing best efforts in line with due diligence to adequately tackle mitigation; see Subpart 2.3 on redressability for a detailed analysis of redressable injunctive remedies in climate-related cases).

As for monetary compensation, providing this remedy against one or some of the actors would only partially and minimally redress the harm. Following the principles of shared responsibility, the respondent should only be held accountable in proportion to their share of responsibility; otherwise, the consequences would be disproportionate and thus unfair. This means that the respondent will only remedy the harm in proportion to their share of liability. If the court only grants compensation without an injunction to mitigate climate change, it would not prevent the respondent from contributing further to the aggravation of the harm, which would be largely unsatisfactory. Consequently, monetary compensation should only be awarded alongside an injunction to mitigate.

Consequently, while this PhD cannot express a firm opinion on the prospect of issuing injunctions based on *general* CDD due to the absence of favourable court judgements in the common law jurisdictions, the preceding analysis shows that the conditions for applying due diligence to climate change are theoretically met. Thus, the law of torts in common law countries should move in this direction, especially in jurisdictions where no *specific* legislation exists or where existing legislation is inadequate.

### 1.3.5 Provisional conclusion and comparative notes on the existence of CDD in the various domestic jurisdictions

Having analysed the applicability of due diligence to climate change in international and human rights law, Subpart 1.3 concludes that *general* CDD also exists in the domestic laws – especially tort law – of the Netherlands, France, Germany and common-law countries for the following main reasons.

Beyond pursuing an identical *function* – i.e. avoiding harm – tort liability laws in the assessed developed countries’ systems (France, Germany, common law countries) stem from Roman law<sup>646</sup>. Although civil law jurisdictions are based on codification and common law countries on case law, there are no significant differences between the two types of legal system in terms of extracontractual tort responsibility. In fact, the civil code provisions concerning *general* tort liability law in France<sup>647</sup> and Germany<sup>648</sup> are as unspecific and general as the common law principles<sup>649</sup>. Additionally, while all jurisdictions use their own labels to some extent to refer to due diligence, it is worth noting that they all encompass the duty of care or due diligence obligation (*devoir de prudence* or *devoir de vigilance* in French law and the *Sorgfaltspflicht* or *Verkehrssicherungspflicht* in German law), which ultimately requires prevention.

More precisely, all domestic duties require the exercise of reasonable conduct in accordance with the standard of care or reasonable man standard (previously referred to as *bonus pater familias*, or *bon père de famille* in French-speaking jurisdictions). This standard requires the implementation of adequate and proportionate measures to prevent foreseeable harms (*prévisibilité*, *Vorhersehbarkeit*). Even if the notion of foreseeability is not explicitly mentioned in the statutory provisions under French and German law, the courts of those countries still use it and carry out a foreseeability and proximity analysis. They assess *in abstracto* and *in concreto* whether the defendant could have reasonably anticipated that their negligence would cause harm to protected interests. In other words, if the damage was not foreseeable, the courts can strike out the case due to a lack of fault or causation. Also, as in international public law and human rights law, the *general* due diligence criteria under the assessed domestic laws leave a margin of discretion for the courts and the duty bearers due to their openness and vagueness.

Another important shared feature is the fact that the duties of care in those jurisdictions are part of the “common”, “customary” or “general” branches of their legal systems, meaning they apply by default. In other

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646 See, notably, Smit L et al, “Study on Due Diligence Requirements through the Supply Chain – Final Report”, *BIICL, Civic Consulting, LSE, European Commission (Directorate-General for Justice and Consumers)*, January 2020 p 158.

647 Article 1240 (former article 1382) and Article 1241 (former article 1383) of the French Civil Code.

648 Section 823 of the German Civil Code BGB.

649 In the UK, the leading case law on the duty of care is the *Caparo* case (UK House of Lords, *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 08 February 1990).



to climate change can be applied *mutatis mutandis* to domestic tort law. In addition, while the French jurisdiction covers pure ecological harms (*prejudice écologique*)<sup>655</sup>, as it does in international law at least since 2018<sup>656</sup>, German tort law and common law jurisdictions protect personal interests in cases of environmental damages, akin to human rights legal systems<sup>657</sup>.

Courts in these countries also have the power to issue injunctions or court orders requiring a minimum level of protection for individual applicants under tort law<sup>658</sup> and the environment<sup>659</sup>, and/or based on the respective constitutions or human rights<sup>660</sup>.

In light of these characteristics and the previous findings regarding the dangers of global warming to environmental, social and personal interests (see subpart 1.1 and 1.2), it seems reasonable to conclude that *general* due diligence also applies to climate change under the assessed domestic laws. It requires public and private entities – including parent companies of multinationals – to address climate change. This opinion is supported by concurring case law outcomes. While there are no cases acknowledging the applicability of *general* due diligence to both public and private actors, such as in the *Urgenda* and *Shell* cases, the outcomes in Germany, France, and common-law countries come already very close:

- The German Constitutional Court found that the ECHR and Art. 20a of the German constitution, which establishes a special duty of care according to the Court, apply to climate change in order to protect individuals and future generations from climate-related harms and serious liberty infringements by state mitigation measures<sup>661</sup>. While climate lawsuits

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655 Cour de cassation, crim., *Erika*, n° 10-82-938, 25 septembre 2012 ; see as well Article 1246 of the French Civil Code (current version).

656 See the ICJ ruling in *Certain activities carried out by Nicaragua in the border area (Costa Rica v Nicaragua)*, 2 February 2018.

657 Deakin S and Adams Z, *Markesinis and Deakin's Tort Law* (8th edn, Oxford University Press 2019), p 447.

658 Common law courts regularly issue injunctions to prevent “private or public nuisances” (see Deakin S and Adams Z, *Markesinis and Deakin's Tort Law* (8th edn, Oxford University Press 2019), p 434 – 437; UK Supreme Court, *Coventry v Lawrence*, [2014] UKSC 13, 26 February 2014).

659 In France, it is notably possible to request enforcement of reasonable measures to prevent or stop environmental damage, see Article 1252 Civil Code.

660 The French Law on the Duty of Vigilance and the European Directive CSDDD foresee remedies such as injunctive relief to enforce compliance with the respective obligations and human rights protection.

661 Constitutional Court of Germany, *Climate Protection Law*, 1 BvR 2656/18, 24 March 2021.

against private actors in Germany have led to the recognition of the relevance of specific legislation (EU automotive regulations), civil courts have not excluded the applicability of *general* CDD in the absence of specific law<sup>662</sup>.

- In France, the Paris Administrative Court acknowledged that the State has a *general* duty to tackle climate change in *Notre affaire à tous et al v France*, though it ultimately found only a breach of specific law<sup>663</sup>. Given that the legal basis used in the latter case also applies to private actors (ecological harm – see articles 1246 – 1252 Civil code), and given that the Paris Court of Appeal admitted a CDD case against the parent company of the multinational group TotalEnergies<sup>664</sup>, it is possible to infer that CDD also applies to companies, as they integrate themselves climate change in their Duty of Vigilance plans.
- In Belgium, which also relies on the Napoleonic Civil Code, the Brussels Court of First Instance and Court of Appeal considered that tort duty of care and the ECHR imposed on the State a duty to reduce GHGs adequately<sup>665</sup>.
- While the climate cases against States in the UK<sup>666</sup> and the USA<sup>667</sup> succeeded on the basis of *specific* laws, one cannot rule out that *general* CDD would be recognised in the future, if no specific legislation were in place, or if the existing legislation were inadequate. Additionally, the Supreme Court of New Zealand declared a case against private actors admissible, thereby opening up a recognition of the existence of *general* CDD in a common-law country (other common-law courts may well consider and apply it too)<sup>668</sup>.

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662 See, for instance, Court of First instance of Stuttgart (Landgericht Stuttgart), 13.9.2022 – 17 O 789/2, § 25; Court of First instance of Brunswick (Landgericht Braunschweig), *Kaiser et al v Volkswagen*, 6 O 3931/21, 14.03.2023.

663 Administrative Court of Paris, *Notre affaire à tous et al v France* (« affaire du siècle »), 3 February 2021, N°1904967, 1904968, 1904972, 1904976/4-1.

664 Court of Appeal of Paris, *Notre affaire à tous et al v TotalEnergies*, n° RG 23/14348, 18 June 2024, p 19 – 22.

665 Court of First Instance of Brussels (French-speaking), *Klimaatzaak*, 2015/4585/A, 17 June 2021, Court of Appeal of Brussels, *Klimaatzaak*, 2021/AR/1589, 2022/AR/737 et 2022/AR/891, 30 November 2021.

666 High Court of London, *Friends of the Earth, Client Earth, Good Law Project v Secretary of State for Business, Energy, and Industrial Strategy*, [2022] EWHC 1841 (Admin), 18 July 2022, § 13

667 SCOTUS, *Massachusetts v EPA*, 549 U. S. \_\_\_\_ (2007).

668 Supreme Court of New Zealand, *Smith v Fronterra et al*, SC 149/2021 [2024] NZSC 5.

#### 1.4 Interim conclusion on CDD's existence

Given the above, *general* due diligence applies to climate change in almost all assessed legal systems. Other important legal scholars have also reached this conclusion<sup>669</sup>, and highly authoritative judicial bodies confirmed this finding in their respective legal systems in 2024-25, such as the Grand Chamber of the ECtHR, the ITLOS, and the ICJ.

The opposite would mean that no *general* law governs climate change, a dangerous implication. Under such a hypothesis, each State or private corporation would have unlimited freedom in the absence of climate treaties or domestic legislation.

However, the recognition of a *general* CDD in the USA, one of the most important jurisdictions in terms of climate change mitigation, is limited to *specific* laws, which are now subject to restrictive interpretations by the SCOTUS. This state of affairs constitutes a fragmentation of the transnational recognition of CDD.

Nonetheless, it is worthwhile to recall here that international customary law obligates each State individually to mitigate climate change, including the USA<sup>670</sup>.

Thus, this thesis identified two main results in the first part. The first is that public and private actors must make their best individual efforts to tackle climate mitigation, meaning – among others – measuring and reducing GHGs, reporting publicly about these measures and cooperating with others, among other things. The second consequence of the applicability of *general* CDD is the potential competence of courts of law (including international ones) to adjudicate climate cases, based on the failure to comply with *general* CDD norms. The courts' adjudication powers are a significant added value compared to the climate conventions. In fact, the Paris Agreement does not provide for specific judicial remedies, and States do not widely accept the UNFCCC dispute settlement provisions in Article 14.

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669 See, among others, the Expert Group on Global Climate Obligations, which established the following: Expert Group on Global Climate Obligations, *The Oslo Principles on Global Climate Change* (Eleven International Publishing, 2015); see as well: Expert Group on Climate Obligations of Enterprises, *The Principles on Climate Obligations of Enterprises* (Eleven International Publishing, 2018).

670 ICJ, *Obligations of States in respect of Climate Change*, Advisory opinion, 23 July 2025; ITLOS, *Advisory Opinion on Climate Change and International Law*, 21 May 2024.